Supreme Court, U.S.
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No. 10-963

In The

Supreme Court of the United States

PROGRESSIVE CASUALTY INSURANCE COMPANY,
an Ohio corporation,

Petitioner,

vs.

ESTATE OF JOSE JUAN PALOMERA-RUIZ,
a single man; GIANT ELECTRIC CORPORATION,
an Arizona corporation,

Respondents

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Arizona may refuse to enforce the preemption provisions of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 *et seq.* ("E-SIGN"), over Arizona's uninsured and underinsured motorist ("UM/UIM") statute, Ariz. Rev. Stat. § 20-259.01, where the UM/UIM statute purports to invalidate a proper electronically documented notice and offer of UM/UIM insurance coverage.

2. Whether the State of Arizona may refuse to give legal effect to a contemporaneously, digitally recorded conversation as a valid and enforceable "electronic record" under E-SIGN, which satisfies the "written notice" requirement in Arizona's UM/UIM statute, Ariz. Rev. Stat. § 20-259.01.

PARTIES TO THE PROCEEDINGS

The caption of this case contains the names of all parties. Progressive Casualty Insurance Company ("Progressive") was the plaintiff in the trial court and the Petitioner here. Giant Electric Corporation ("Giant Electric") and the Estate of Jose Juan Palomera-Ruiz ("Estate") were defendants in the trial court and Respondents here.

CORPORATE DISCLOSURE STATEMENT

Progressive Casualty Insurance Company is a wholly owned subsidiary of Drive Insurance Holdings, Inc., a private company. Drive Insurance Holdings, Inc., in turn, is a wholly owned subsidiary of The Progressive Corporation, a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	9
I. The Position of Arizona's Courts Is Contrary to E-SIGN's Federal Preemption Provisions	9
A. E-SIGN Preempts All State Laws that Purport to Require a Writing	10
B. To the Extent E-SIGN Permits Arizona to Adopt the Uniform Electronic Transactions Act ("UETA"), Arizona Courts May Not Circumvent E-SIGN Preemption by Imposing Non-Electronic Delivery Methods	12
II. The Validity of Electronic Recordings of Oral Communications Under E-SIGN and UETA Is an Important Federal Question and a Matter of Nationwide Importance	21

TABLE OF CONTENTS – Continued

Page

III. The Arizona Court of Appeals' Decision Is Inconsistent with the New Mexico Supreme Court's Decision in *Jordan v. Allstate Ins. Co.*, ___ P.3d ___, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010 28

IV. Courts and Administrative Agencies Have Reached Conflicting Conclusions Regarding the Validity and Enforceability of Electronic Records of Oral Communications 31

CONCLUSION 36

APPENDIX

Arizona Court of Appeals' Opinion dated May 20, 2010 ..... App. 1

Judgment of the Maricopa County Superior Court dated Nov. 25, 2008 ..... App. 13

Arizona Supreme Court Order dated Oct. 26, 2010 ..... App. 16

Additional Constitutional and Statutory Provisions ..... App. 18

Progressive's Response in Opposition to Estate's Motion for Summary Judgment ..... App. 38

Progressive's Cross Motion for Summary Judgment ..... App. 49

TABLE OF CONTENTS – Continued

Page

Progressive's Response in Opposition to Separate Statement of Facts in Support of Estate's Motion for Summary Judgment and Separate Statement of Facts in Support of Progressive's Cross Motion for Summary Judgment.....App. 72

Progressive's Reply in Support of Cross Motion for Summary Judgment.....App. 126

Progressive's Opening Brief in Court of Appeals.....App. 180

Progressive's Reply Brief in Court of Appeals....App. 241

Arizona Supreme Court Petition for Review ....App. 287

TABLE OF AUTHORITIES

Page

CASES:

Calvert v. Farmers Ins. Co. of Arizona, 144 Ariz. 291, 697 P.2d 684 (1985) (In Banc).....1

Chmieloski v. National Union Fire Ins. Co., 563 So. 2d 164 (Fla. 2d DCA 1990).....23

Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).....33

Friedman v. Clark, 248 A.2d 867 (Md. 1969) 33

Grinnell Corp. v. Wood, 389 S.C. 350, 698 S.E.2d 796 (2010) 23

Hagen v. U.S. Fid. & Guar. Ins. Co., 138 Ariz. 491, 675 P.2d 1310 (1984) (In Banc).....2

In re Marriage of Takusagawa, 38 Kan. App. 2d 401, 166 P.3d 440 (Kan. Ct. App. 2007).....31, 32

Jordan v. Allstate Ins. Co., ___ P.3d ___, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010 .....28, 29, 30

Liberty Mut. Ins. Co., Inc. v. Ledford, 691 So. 2d 1164 (Fla. Dist. Ct. App. 1997) 23

Londono v. City of Gainesville, 768 F.2d 1223 (11th Cir. 1985).....32

Marckstadt v. Lockheed Martin Corp., 147 N.M. 678, 228 P.3d 462, 2010-NMSC-001 (N.M. 2009).....30

Naldi v. Grunberg, 908 N.Y.S.2d 639 (N.Y. App. Div. 2010).....20

Parker v. Williams, 977 So. 2d 476 (Ala. 2007).....34, 55

TABLE OF AUTHORITIES – Continued

Page

People v. Avila, 770 P.2d 1330 (Colo. Ct. App. 1988) 33

Progressive Casualty Ins. Co. v. Estate of Palomera-Ruiz, 224 Ariz. 380, 231 P.3d 384 (Ariz. App. 2010) ..... *passim*

Ray v. Austin, 388 S.C. 605, 698 S.E.2d 208 (2010) 23

Sawyer v. Mills, 295 S.W.3d 79 (Ky. 2009) 34, 35

State Farm Mutual Automobile Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987) 23

Stringer v. Bufkin, 465 So. 2d 331 (Miss. 1985) 23

Tallent v. National General Ins. Co., 185 Ariz. 266, 915 P.2d 665 (1996) 16

Teachers Ins. Co. v. Bollman, 617 So. 2d 817 (Fla. Dist. Ct. App. 1993) 23

Union Am. Ins. Co. v. Cabrera, 721 So. 2d 313 (Fla. Dist. Ct. App. 1998) 23

CONSTITUTIONAL PROVISIONS:

U.S. CONST. art. VI, cl. 2 3

STATUTES AND RULES:

15 U.S.C. §§ 1011 *et seq.* 11

15 U.S.C. §§ 7001 *et seq.* ..... *passim*

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2403(b) 2

Ala. Code §§8-1A-1 *et seq.* 24, 35

Ariz. Rev. Stat. § 12-1831 5

Ariz. Rev. Stat. § 20-259.01 ..... *passim*

Ariz. Rev. Stat. §§ 44-7001 *et seq.* ..... *passim*

5 ILCS 175/1-101 *et seq.* 17

Kan. Stat. Ann. §§ 16-1601 *et seq.* (Supp. 2006) 32

N.M. Stat. Ann. § 14-16-2(5) 24

N.M. Stat. Ann. § 66-5-301(C) (1978) 29

N.Y. State Tech. Law §§ 301 *et seq.* (McKinney) 17, 20, 34

Uniform Electronic Transactions Act ("UETA"), as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999 ..... *passim*

Wash. Rev. Code §§ 19.34.010 *et seq.* 17

U.S. SUP. CT. R. 10(b) and (c) 9, 22, 28

U.S. SUP. CT. R. 14(e)(v) 2

U.S. SUP. CT. R. 29.4(c) 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

LEGISLATIVE MATERIALS

145 Cong. Rec. S14,881, S14,882 (daily ed. Nov. 19, 1999) 11

146 Cong. Rec. S5224 (daily ed. June 15, 2000) 19

Senate Mem. in Support of L. 2002, Ch. 314, 2002 McKinney's Session Laws of N.Y., at 1881 20

ADMINISTRATIVE AND EXECUTIVE MATERIALS

Nev. Admin. Code 616B.9916 33

Regulation 13.12.3.9, N.M. Admin. Code 29, 30

Miss. Op. Att'y Gen. No. 2002-0161, 2002 WL 1057931, at *1-2 (Apr. 19, 2002) 33

N.Y. Gen. Counsel Op. 8-18-2004 (#8) 34

2008 Ohio Op. Att'y Gen. 2-203, Op. No. 2008-019, 2008 WL 2454889, at *1-2 (June 16, 2008) 34

SECONDARY SOURCES

BLACK'S LAW DICTIONARY 1081 (6th ed. 1990) 16

BLACK'S LAW DICTIONARY 1748 (9th ed. 2009) 30

CORBIN ON CONTRACTS § 1.11 (revised ed. 1993) 16

CORBIN ON CONTRACTS § 23.1A (Supp. 2007) 32

TABLE OF AUTHORITIES – Continued

Page

Jamie A. Splinter, Comment, *Does E-SIGN Preempt the Illinois Electronic Commerce Security Act?*, 27 S. ILL. U. L.J. 129, 160 (Fall 2002) 21

Matthew G. Dore, *Preemption Questions Relating to E-Sign and IUETA*, 6 IA. PRAC. § 33:26 (2010 ed.) 20, 21

RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) 16

Robert A. Wittie & Jane K Winn, *Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA*, 56 BUS. LAW. 293, 340 (2000) 15, 21

OPINIONS BELOW

The Arizona Court of Appeals' opinion affirming the Maricopa County Superior Court's Judgment is published as *Progressive Casualty Insurance Company v. Estate of Palomera-Ruiz*, 224 Ariz. 380, 231 P.3d 384 (Ariz. App. 2010), and is reprinted in the Appendix ("App.") at 1. The Arizona Supreme Court's Order denying review without comment is not reported. App. at 16. The Judgment and Order of the Maricopa County Superior Court granting Respondent Estate's Motion for Summary Judgment and denying Progressive's Cross Motion for Summary Judgment is unreported and reproduced in App. at 13.

STATEMENT OF JURISDICTION

Progressive respectfully seeks review of the Order of the Arizona Court of Appeals, Division One, reproduced in App. at 1. The Arizona Supreme Court denied discretionary review on October 26, 2010. App. at 16.[1] This Court has jurisdiction pursuant to 28

[1] Progressive's counsel contacted the supervisor of this Court's Case Analyst Division, who felt that a writ of certiorari would be properly directed to the Arizona Court of Appeals rather than to the Arizona Supreme Court under these circumstances. Progressive's counsel was concerned because Arizona law is not clear as to whether the Arizona Supreme Court's denial of a Petition for Review of a decision of the Arizona Court of Appeals operates as a decision on the merits *Compare Calvert v Farmers Ins Co of Arizona*, 144 Ariz 291, 297, n 5, 697 P.2d 684, 690, n 5 (1985) (In Banc) ("[D]enial of review does not mean

(Continued on following page)

U.S.C. § 1257(a). Pursuant to U.S. Sup. Ct. Rules 14(e)(v) and 29.4(c), Petitioner hereby states that 28 U.S.C. § 2403(b) may apply and that a copy of this

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we accepted the Court of Appeals' legal analysis or conclusion in those cases. Denial of a petition for review has no precedential value."); *with Hagen v. U.S. Fid. & Guar. Ins. Co.*, 138 Ariz. 491, 491, 675 P.2d 1310, 1310 (1984) (In Banc) ("[D]enial of review usually attests our approval of the result reached by the court of appeals . . ."). One prominent commentator stated

> If resort has been had to the court that is clearly the highest state court, summary denial of review may still leave it unclear whether Supreme Court review should be directed to that court or a lower court. In a number of cases, review has been held available from an intermediate state appellate court, even though under state practice a denial of review indicates a higher court determination that the judgment was correct. [Citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Minneapolis, St. P. & S.S.M. Ry. v. Rock*, 279 U.S. 410 (1929); *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).] In other cases, review has been directed to the higher state court, apparently on the ground that dismissal of an appeal was more explicitly a judgment on the merits. [Citing *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 138 (1986); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 338 (1986); *Martin v. City of Struthers*, 319 U.S. 141, 142 n.2 (1943); *Tumey v. Ohio*, 273 U.S. 510 (1927).]

16B CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. JURIS. § 4007 (2d ed.). In the event this Court finds that certiorari is properly directed to the Arizona Supreme Court rather than the Arizona Court of Appeals, then Progressive petitions for a writ of certiorari to the Arizona Supreme Court and respectfully requests that this petition be deemed as such.

petition will be served on the Attorney General of Arizona.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Relevant portions of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 *et seq.* ("E-SIGN"), are reproduced in App. at 18.

Relevant portions of the Uniform Electronic Transactions Act ("UETA"), as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, are reproduced in App. at 27.

Relevant portions of Arizona's Uniform Electronic Transaction Act, Ariz. Rev. Stat. §§ 44-7001 *et seq.* ("AETA"), are reproduced in App. at 31.

Arizona's uninsured and underinsured motorist ("UM/UIM") statute, Ariz. Rev. Stat. § 20-259.01, provides in pertinent part:

> **B.** Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and shall by written notice offer the insured and at the request of the insured shall include within the policy underinsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy. The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director shall be valid for all insureds under the policy. The completion of such form is not required where the insured purchases such coverage in an amount equal to the limits for bodily injury or death contained in the policy. The offer need not be made in the event of the reinstatement of a lapsed policy or the transfer, substitution, modification or renewal of an existing policy. At the request of the insured, the insured may purchase and the insurer shall then include within the policy underinsured motorist coverage that extends to and covers all persons insured under the policy in any amount authorized by the insured up to the liability limits for bodily injury or death contained within the policy.

Ariz. Rev. Stat. § 20-259.01(B).

STATEMENT OF THE CASE

1. Progressive submits this petition to obtain review of the Arizona Court of Appeals' opinion in *Progressive Casualty Insurance Company v. Estate of Palomera-Ruiz*, 224 Ariz. 380, 231 P.3d 384 (Ariz. App. 2010). The Court of Appeals' opinion affirmed the judgment of the Maricopa County Superior Court, which granted Respondent Estate's Motion for Summary Judgment and denied Progressive's Cross Motion for Summary Judgment. The Arizona Supreme Court denied discretionary review on October 26, 2010. App. at 16. This Court should grant certiorari and reverse the decisions below.

2. Progressive brought this action pursuant to Ariz. Rev. Stat. § 12-1831, the Arizona Declaratory Judgment Act, seeking a declaration that the insurance policy it issued to Respondent Giant Electric had uninsured/underinsured motorist ("UM/UIM") coverage limits of $100,000 per claim and $300,000 in the aggregate. On November 12, 2001, Progressive received a telephone call from Christopher W. Thompson, the President/CEO of Giant Electric, applying for insurance with Progressive. [*See* transcript of November 12, 2001 telephone call, App. at 78]. The telephone conversation was electronically recorded. [*Id.*; *see also* Declaration of Stacey Koskinen, App. at 122]. Mr. Thompson requested liability insurance in the amount of $1,000,000. [App. at 86, 90]. During the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. [App. at 99-101]. Instead, Mr.

Thompson knowingly and voluntarily chose $100,000 of UM/UIM coverage. [*Id.*]. Thereafter, Progressive issued a commercial auto policy ("Policy") to Giant Electric for the policy term of January 5, 2001 through January 1, 2002. The Policy provided coverage with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. The Policy was renewed for six (6) successive years with the same UM/UIM coverage limits.

3. On or about September 12, 2006, Jose Juan Palomera-Ruiz was involved in an automobile accident while riding as a passenger in a vehicle owned by Giant Electric. Mr. Palomera-Ruiz sustained fatal injuries in the accident. Respondent Estate demanded $1,000,000 to settle its UM/UIM claim arising out of the accident, alleging that the selection of UM/UIM limits by Giant Electric was ineffective and that the Policy provides UM/UIM coverage limits in the amount equal to the liability limits. The Estate relied on Arizona's UM/UIM statute, Ariz. Rev. Stat. § 20-259.01(B), which provides in relevant part:

> Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and *shall by written notice offer* the insured and at the request of the insured shall include within the policy underinsured motorist coverage which extends to and covers all persons insured under the policy, in limits

> not less than the liability limits for bodily injury or death contained within the policy.

(Emphasis added).

4. The Estate and Progressive filed Cross Motions for Summary Judgment on the issue of whether the electronically documented phone conversation satisfied the above statute's "written notice" requirement.[2] Progressive argued in relevant part that E-SIGN and AETA preempt Arizona's UM/UIM statute, Ariz. Rev. Stat. § 20-259.01, to the extent the UM/UIM statute purports to invalidate an electronically recorded telephonic offer of UM/UIM coverage. [App. at 61-68, 128-52]. The trial court granted the Estate's Motion for Summary Judgment and denied Progressive's Cross Motion for Summary Judgment. [App. at 14]. The trial court relied exclusively upon Arizona's UM/UIM statute and interpreting caselaw, and refused to address the preemptive effects of

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[2] For the Court's convenience, the relevant documents which Progressive filed in the trial court are set forth in the Appendix as follows.

- Progressive's Response in Opposition to Estate's Motion for Summary Judgment ("MSJ"), App. at 38;
- Progressive's Cross-MSJ, App. at 49;
- Progressive's Response in Opposition to Separate Statement of Facts in Support of Estate's MSJ *and* Separate Statement of Facts in Support of Progressive's Cross-MSJ, App. at 72;
- Progressive's Reply in Support of Cross-MSJ, App. at 126

E-SIGN or AETA. [*See* April 14, 2008 Transcript of Trial Court Oral Argument, App. at 175-76]. On November 25, 2008, the trial court entered Judgment in favor of Giant Electric and the Estate, holding that the Policy's UM/UIM limits were $1,000,000 at the time of the September 12, 2006 accident. [App. at 13-15].

5. On appeal, Progressive argued that the trial court erred because E-SIGN and AETA preempt the UM/UIM statute, Ariz. Rev. Stat. § 20-259.01, to the extent it negates application of proper electronically recorded notices. [*See* Progressive's Opening Br., App. at 204-28; Progressive's Reply Br., App. at 254-56, 58-64]. On May 20, 2010, the Court of Appeals issued its opinion affirming the trial court's decision. *See Progressive Casualty Ins. Co. v. Estate of Palomera-Ruiz*, 224 Ariz. 380, 231 P.3d 384 (App. 2010). The Court of Appeals relied on Arizona's UM/UIM statute and interpreting caselaw, and refused to address the preemptive effects of E-SIGN and AETA, only mentioning them in a brief footnote as follows:

> We likewise find unavailing Progressive's claim that the recorded telephone conversation qualifies as a written notice in light of (1) the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 to 7006 (2000) (E-SIGN); and (2) the Arizona Electronic Transaction Act, A.R.S. §§ 44-7001 to -7051 (AETA) (2003 & Supp.2008). Even if the electronic recording at issue qualifies as a "writing" in other contexts, neither it nor any other type of written notice was provided

> to the insured. Here, because the only notice Progressive extended to the insured was oral, it failed to satisfy A.R.S. § 20-259.01's express requirement of a "written notice."

224 Ariz. at 384, n.2, 231 P.3d at 388, n.2 (*see* App. at 9, n.2).

6. On June 15, 2010, Progressive filed its Petition for Review by the Arizona Supreme Court. [App. at 287]. Progressive again argued that E-SIGN and AETA preempted Arizona's UM/UIM statute, to the extent the UM/UIM statute purports to invalidate any possibility of a proper electronically documented notice and offer of UM/UIM coverage. [App. at 292-302]. The Arizona Supreme Court denied the Petition for Review on October 26, 2010, without comment. [App. at 16].

REASONS FOR GRANTING THE PETITION

I. The Position of Arizona's Courts Is Contrary to E-SIGN's Federal Preemption Provisions.

This Court should accept review on a writ of certiorari because the Arizona Court of Appeals' decision is contrary to E-SIGN's federal preemption provisions. One of the circumstances this Court considers in exercising its discretion to accept review is that a state court "has decided an important question of federal law that has not been, but should be, settled by this Court." U.S. SUP. CT. R. 10(c).

Petitioner respectfully submits that this Court should grant certiorari, because the Court has never issued guidance regarding the federal preemptive effect of E-SIGN on state laws that purport to require a writing.

A. E-SIGN Preempts All State Laws that Purport to Require a Writing.

The Supremacy Clause provides that where states and the federal government pass legislation on the same subject matter, the federal law is supreme, and the conflicting state law is rendered void. *See* U.S. Const. art. VI. Here, E-SIGN preempts all state laws that purport to require a writing, including Arizona's UM/UIM statute. E-SIGN provides in relevant part:

> Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –
>
> (1) a signature, contract, *or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form*; and
>
> (2) a contract relating to such transaction *may not be denied legal effect*, validity, or enforceability solely because an electronic signature or *electronic record was used in its formation.*

15 U.S.C. § 7001(a) (emphasis added).

In enacting E-SIGN, Congress sought to facilitate the uniform use of electronic records and signatures in e-commerce. 145 Cong. Rec. S14,881 (daily ed. Nov. 19, 1999) (Congressional finding that the growth of e-commerce in the private sector is in the national interest); *id.* at S14,882 (statement of Sen. Lott that e-commerce "is a significant driving force behind our nation's robust and expanding economy."). Pursuant to 15 U.S.C. § 7001(a), E-SIGN applies to the recorded phone call in this case, notwithstanding the purported writing requirement contained in Arizona's UM/UIM statute.

Moreover, Congress specifically intended its enactment of E-SIGN specifically to apply to the business of insurance and that E-SIGN would preempt all states' laws to the contrary:

> (i) Insurance
>
> It is the specific intent of the Congress that this subchapter and subchapter II of this chapter *apply to the business of insurance.*

15 U.S.C. § 7001(i) (emphasis added). Therefore, "inverse preemption" under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, does *not* apply.[3] Construing

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[3] Section 2 of the McCarran-Ferguson Act provides

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . *unless such Act specifically relates to the business of insurance.*

15 U S C § 1012(b) (emphasis added).

15 U.S.C. § 7001(i) and 15 U.S.C. § 1012(b) together, it is clear that E-SIGN preempts Ariz. Rev. Stat. § 20-259.01(B) to the extent that Ariz. Rev. Stat. § 20-259.01(B) purports to invalidate a proper electronically documented offer of UM/UIM coverage. This Court should accept review and declare the enforceability of E-SIGN's preemption provisions with respect to contrary state laws that purport to require a physical writing.

B. To the Extent E-SIGN Permits Arizona to Adopt the Uniform Electronic Transactions Act ("UETA"), Arizona Courts May Not Circumvent E-SIGN Preemption by Imposing Non-Electronic Delivery Methods.

This petition should also be granted because this Court should issue guidance on the preemptive effect of E-SIGN where a State adopts the Uniform Electronic Transactions Act ("UETA") or some other statute governing electronic transactions. E-SIGN provides a limited scenario by which a State can avoid federal preemption by either adopting the official version of UETA or by enacting alternative statutory provisions that are consistent with E-SIGN and are technology-neutral:[4]

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[4] If such alternative statutory provisions are enacted or adopted after June 30, 2000, they also must make specific reference to E-SIGN. 15 U S C § 7002(a)(2)(B).

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law –

(1) constitutes an enactment or *adoption of the Uniform Electronic Transactions Act* as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; *or*

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if –

(i) *such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter*; and

(ii) such alternative procedures or requirements *do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification* for performing the functions of creating, storing, generating,

> receiving, communicating, or authenticating electronic records or electronic signatures.

15 U.S.C. § 7002(a) (emphasis added).

However, a State may not "circumvent [E-SIGN] through the imposition of nonelectronic delivery methods under Section 8(b)(2) of [UETA.]" 15 U.S.C. § 7002(c).[5] Thus, states may not use E-SIGN's preemption provision as "a loop-hole that allows them to replace existing requirements for 'written' records

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[5] UETA § 8(b)(2), in turn, is a savings provision for laws which provide for the means of delivering or displaying information and which are not affected by UETA

> (b) If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply.
>
> (1) The record must be posted or displayed in the manner specified in the other law
>
> (2) Except as otherwise provided in subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law.
>
> * * *
>
> (d) The requirements of this section may not be varied by agreement, but
>
> * * *
>
> (2) a requirement under a law other than this [Act] to send, communicate, or transmit a record by [first-class mail, postage prepaid] [regular United States mail], may be varied by agreement to the extent permitted by the other law

UETA § 8

with new mailing or physical delivery requirements that would make the use of electronic records impracticable." Robert A. Wittie & Jane K Winn, *Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA*, 56 Bus. Law. 293, 333 (2000). Implicit in 15 U.S.C. § 7002(c) is that "states that have not adopted official UETA also may not use laws requiring a particular method of physical delivery to preclude the use of electronic delivery methods." *Id.* Despite E-SIGN's anti-circumvention clause, Arizona courts have circumvented the requirements of E-SIGN in this case, by inserting an extra requirement into AETA that electronically recorded conversations must be "provided" to the recipient. Specifically, in a footnote and without analysis, the Arizona Court of Appeals created a huge new loop hole by judicial fiat to E-SIGN and AETA, stating that "[e]ven if the electronic recording at issue qualifies as a 'writing' in other contexts, neither it nor any other type of written notice was *provided* to the insured." [Court of Appeals' Opinion, App. at 9, ¶ 14, n.2 (emphasis added)]. E-SIGN does not permit this kind of judicial legislation.

Prior to this case, there was never a requirement in Arizona's UM/UIM statute that the insurer physically "provide" the consumer with a contemporaneously retainable copy of the UM/UIM offer. The operative verb in Arizona's UM/UIM statute is "offer," not "provide." Ariz. Rev. Stat. § 20-259.01(B) (requiring that an insurer "shall by written notice offer the insured" UM/UIM coverage up to the liability limits.).

The Arizona Supreme Court has previously held that the meaning of "offer" in the UM/UIM statute is "[t]o bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not." *Tallent v. National General Ins. Co.*, 185 Ariz. 266, 267-68, 915 P.2d 665, 666-67 (1996) (citing BLACK'S LAW DICTIONARY 1081 (6th ed. 1990); CORBIN ON CONTRACTS § 1.11 (revised ed. 1993) ("An offer is an expression by one party of assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express assent to the same terms."); Restatement (Second) of Contracts § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.")). This is exactly what Progressive did. The Arizona courts circumvented E-SIGN by judicially inserting a new requirement – not included in the UM/UIM statute – that Progressive should have "provided" the proper electronically recorded telephone conversation to Mr. Thompson. This is contrary to 15 U.S.C. § 7002(c) because this newly-created physical delivery requirement is being used by Arizona to limit, preclude or negate proper electronic transactions. This Court should accept review so that it can declare that such attempts at circumvention are invalid.

Consistent with the E-SIGN's preemption provision, 47 states have adopted some version of UETA. The remaining three (3) states – Illinois, New York,

and Washington – have enacted separate statutes relating to electronic transactions.[6] At least 42 of the 47 adopting states have made substantive changes (beyond renumbering and the like), such that those statutes no longer constitute the official version of UETA that was approved and recommended by the National Conference of Commissioners on Uniform State Laws in 1999.[7] To the extent the Arizona courts have judicially legislated a requirement that proper electronically recorded telephone calls must be "provided" to the recipient in order to qualify as electronic records, then AETA does not conform to the official version of UETA. If Arizona desires to enact alternative procedures or requirements that are different from UETA, such alternative procedures must be consistent with E-SIGN and be technology-neutral. *See* 15 U.S.C. §§ 7002(a)(2)(A)(i) and (ii). The Arizona Court of Appeals' decision in this case violates both of these mandates. First, it is inconsistent with E-SIGN, because, as discussed below, a proper electronically

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[6] *See* 5 ILCS 175/1-101 *et seq.* (Electronic Commerce Security Act); N.Y State Tech. Law §§ 301 *et seq.* (Electronic Signatures and Records Act); Wash. Rev. Code §§ 19.34 010 *et seq.* (Washington Electronic Authentication Act)

[7] These include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Maine, Michigan, Montana, Missouri, New Hampshire, New Jersey, New Mexico, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.

recorded phone call does qualify as an electronic record under E-SIGN. Second, the Court of Appeals' decision is not technology-neutral, because it accords lesser legal status or effect to electronically recorded telephone calls versus other forms of electronic communication.

Properly interpreted, UETA, like E-SIGN, preempts all state laws that purport to require a writing. Arizona's AETA provides in relevant part:

> Legal recognition of electronic records, signatures and contracts
>
> A. A record or signature in electronic form *cannot be denied legal effect* and enforceability solely because the record or signature is in electronic form.
>
> B. A contract formed by an electronic record *cannot be denied legal effect* and enforceability solely because an electronic record was used in its formation.
>
> C. An electronic record *satisfies any law* that requires a record to be in writing.

Ariz. Rev. Stat. § 44-7007 (emphasis added). Thus, both E-SIGN and AETA invalidate Ariz. Rev. Stat. § 20-259.01(B) to the extent that Ariz. Rev. Stat. § 20-259.01(B) purports to require an offer of UM/UIM coverage in paper form. The Prefatory Notes to UETA lend support for the proposition that the electronic offer made to Giant Electric should be given legal effect:

> The need for certainty as to the scope and applicability of this Act is critical, and makes any sort of a broad, general exception based on notions of inconsistency with existing writing and signature requirements unwise at best. The uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws is unacceptable if electronic transactions are to be facilitated.

UETA Prefatory Note (A).

The Arizona Court of Appeals' decision is contrary to the foregoing expression of legislative intent and, by extension, contrary to the intent of Congress in allowing states to avoid preemption by adopting UETA. Rather than modifying each and every statute containing an "in writing" or "written" requirement, Congress enacted E-SIGN and allowed states to adopt UETA (or alternative statutes consistent with E-SIGN) in order to achieve a uniform global effect on and modification of all state and federal laws, including Ariz. Rev. Stat. § 20-259.01(B). *See* 146 Cong. Rec. S5224 (daily ed. June 15, 2000) (statement of Sen. Abraham) ("[T]he central purpose of this legislation is to establish a nation-wide baseline for the legal certainty of electronic signatures and records. . . . I believe that the eventual adoption of UETA by all 50 states in a manner consistent with the version reported by NCCUSL [National Conference of Commissioners on Uniform State Laws] will provide the same national uniformity which is established in the Federal legislation."); *see also* Ariz. Rev.

Stat. § 44-7006(3) (stating that AETA should be construed and applied to "make uniform the law of this state"); Ariz. Rev. Stat. § 44-7007(C) (providing that "an electronic record satisfies *any law* that requires a record to be in writing.") (emphasis added). Consequently, the UM/UIM written offer requirement under Arizona law can be made and/or stored by electronic means because it still satisfies the statute's requirement of evidence that the insured accepted or rejected UM/UIM coverage. To the extent the Arizona courts impermissibly legislated a judicial exception for Arizona's UM/UIM statute, then AETA is not the official version of UETA and is preempted by virtue of 15 U.S.C. § 7002(a)(1).

This Court has never examined the degree to which E-SIGN preempts non-conforming versions of UETA such as AETA, and more particularly, whether E-SIGN preempts such statutes in whole or only in part. Indeed, E-SIGN's highly unusual preemption scheme has been a source of confusion for courts and commentators alike. *See Naldi v. Grunberg*, 908 N.Y.S.2d 639, 649, n.3 (N.Y. App. Div. 2010) ("Determining which law [E-SIGN or New York's Electronic Signature and Records Act, N.Y. State Tech. Law § 301 *et seq.*] applies to particular transactions has *caused confusion* in the business community and thereby has an *inhibiting effect on the expansion of electronic commerce* in New York.") (emphasis added; citing Senate Mem. in Support of L. 2002, Ch. 314, 2002 McKinney's Session Laws of N.Y., at 1881); Matthew G. Dore, *Preemption Questions Relating to*

E-Sign and IUETA, 6 Ia. Prac. § 33:26 (2010 ed.) ("[T]here are obvious questions whether [Iowa's adoption of UETA] is preempted in whole or in part. E-Sign includes an express provision regarding preemption that *makes this analysis particularly difficult*.") (emphasis added); Jamie A. Splinter, Comment, *Does E-SIGN Preempt the Illinois Electronic Commerce Security Act?*, 27 S. ILL. U. L.J. 129, 160 (Fall 2002) ("[T]here is *uncertainty* about whether a court will find the Illinois Act preempted by E-SIGN. . . .") (emphasis added); Robert A. Wittie & Jane K Winn, *Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA*, 56 Bus. Law. 293, 340 (2000) ("[T]he *complex and ambiguous preemption rules* in E-SIGN are likely to remain a source of confusion for some time for the state and federal agencies that are subject to them.") (emphasis added).

This Court should accept review upon certiorari in order to provide guidance on the preemptive effect of E-SIGN where a State, such as Arizona, has adopted UETA or some other electronic transaction statute.

II. The Validity of Electronic Recordings of Oral Communications Under E-SIGN and UETA Is an Important Federal Question and a Matter of Nationwide Importance.

This Court should grant certiorari because the validity of electronic recordings of oral communications under E-SIGN is a matter of nationwide

importance and "an important question of federal law that has not been, but should be, settled by this Court." U.S. SUP. CT. R. 10(c). Because E-SIGN allows states to avoid preemption by adopting the official version of UETA, the validity of recorded oral communications under UETA is also an important question of federal law and of national importance.

In the context of issues pertinent to this case, 35 states require the insured to affirmatively reject UM/UIM coverage in writing for the rejection to be valid.[8] Nine (9) states have enacted statutes requiring the insurer to make a written offer of UM/UIM coverage.[9] Seventeen (17) states require the use of a special form or other specific visual requirement in the context of an offer and/or rejection of UM/UIM coverage.[10] Ten (10) states require the insured's signature

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[8] These include Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin

[9] These include Arizona, Maryland, Nevada, New Jersey, New York, North Carolina, South Carolina, West Virginia, and Wisconsin

[10] These include Connecticut, Florida, Hawaii, Louisiana, Maine, Maryland, Nevada, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and West Virginia.

to effectuate the choice of coverage.[11] So far, only three (3) states have allowed oral waiver of their statutory "writing" requirements for UM/UIM offer and/or rejection.[12] Under the plain language of both E-SIGN and UETA, proper electronically recorded telephone calls ought to be upheld as valid and enforceable under these UM/UIM statutes across the country. E-SIGN provides the following definitions:

> (2) Electronic
>
> The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
>
> * * *

---

[11] These include Connecticut, Hawaii, Iowa, Louisiana, New Jersey, Oregon, Pennsylvania, Rhode Island, Utah, and West Virginia.

[12] **Florida:** *Union Am. Ins. Co v Cabrera*, 721 So 2d 313, 314 (Fla Dist Ct App 1998); *Liberty Mut. Ins Co, Inc. v Ledford*, 691 So 2d 1164, 1168, n 3 (Fla. Dist. Ct App 1997); *Teachers Ins. Co. v Bollman*, 617 So 2d 817, 818 (Fla. Dist Ct. App 1993); *Chmieloski v. National Union Fire Ins. Co.*, 563 So. 2d 164, 166 (Fla 2d DCA 1990)

Mississippi: *Stringer v. Bufkin*, 465 So 2d 331, 334 (Miss 1985).

South Carolina: *Grinnell Corp v. Wood*, 389 S C. 350, 355-56, 698 S.E 2d 796, 798-99 (2010) (citing *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, 291 S C 518, 354 S.E 2d 555 (1987)); *see also Ray v Austin*, 388 S C. 605, 613, 698 S.E 2d 208, 212 (2010) (same).

> 4) Electronic record
>
> The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

15 U.S.C.A. § 7006. AETA's definitions are substantially identical:

> (5) The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
>
> * * *
>
> (7) "Electronic record" means a record that is created, generated, sent, communicated, received or stored by electronic means.

Ariz. Rev. Stat. § 44-7002.[13] These broad definitions are technology-neutral and are intended to encompass a wide range of electronic recordings, including telephonic recordings. Importantly, an electronic record need not be in a visual format. Under the broad statutory definitions, the recorded phone call in this case clearly qualifies as "electronic" and as an "electronic record." [*See* Aff. of Stacey Koskinen, App.

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[13] Alabama and New Mexico have added the word "telephonic" to the definition of "electronic" in their respective versions of UETA *See* Ala Code § 8-1A-2(6); N M Stat Ann. § 14-16-2(5). The Alabama Comments to this section state that "[t]his addition is intended to clarify, not to change, the uniform act "

at 122, for description of Progressive's electronic recording process.]

To further clarify the matter, Comment 4 to UETA § 2 explains, that "electronic" includes biological, chemical as well as electromagnetic media:

> While not all technologies listed [in UETA § 2] are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. *However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This Act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.*

UETA § 2, comment 4. It is beyond dispute that the recorded phone call in this case has been stored and "retrieved in perceivable form," so it is clearly "electronic." *Id.* Furthermore, Comment 6 to UETA § 2

also provides that audio and video tape recordings constitute electronic records:

> 6. "**Electronic record**." An electronic record is a subset of the broader defined term "record." *It is any record created, used or stored in a medium other than paper* (see definition of electronic). . . .
>
> * * *
>
> Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, *audio and video tape recordings*, among other records, all would be electronic records under this Act.

UETA § 2, comment 6. Similarly, E-SIGN defines an "electronic signature" as follows:

> The term "electronic signature" means an electronic *sound*, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

15 U.S.C. § 7006(5) (emphasis added); *accord* Ariz. Rev. Stat. § 44-7002(8) ("'Electronic signature' means an electronic *sound*, symbol or process that is attached to or logically associated with a record and that is executed or adopted by an individual with the intent to sign the record.") (emphasis added). Giant Electric provided its "electronic signature" within the meaning of E-SIGN and AETA, by the *sound* of Mr. Thompson's voice when he orally declined

Progressive's offer of UM/UIM coverage equal to the liability limits and orally accepted $100,000 UM/UIM limits and by providing identifying information, including his name, his title, his driver's license number, his bank account number, routing number, and a check number. [*See* App. at 86, 90, 99-101, 103-04, 116-17].

Under the statutory language and legislative history set forth above, an electronically recorded telephone call qualifies as an "electronic record" under E-SIGN and AETA and must be given legal effect. The proper interpretation of E-SIGN and AETA is a matter of nationwide importance because of the large number of states that have enacted a "writing" requirement relating to the offer and/or rejection of UM/UIM coverage in the context of both personal and commercial insurance policies. Insurance carriers like Progressive have relied on E-SIGN and UETA for the past decade for the validity of electronic transactions and records in issuing both personal and commercial policies. The Arizona courts' decisions cast doubt and confusion upon the legal efficacy of those transactions and records. Consequently, this Court should clear up the confusion by granting certiorari and reversing the opinions below.

III. The Arizona Court of Appeals' Decision Is Inconsistent with the New Mexico Supreme Court's Decision in *Jordan v. Allstate Ins. Co.*, ___ P.3d ___, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010.

This Court should accept review on a writ of certiorari because the Arizona Court of Appeals' decision is inconsistent with the New Mexico Supreme Court's recent decision in *Jordan v. Allstate Ins. Co.*, ___ P.3d ___, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010. Certiorari is appropriate because "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort. . . ." U.S. SUP. CT. R. 10(b). In this case, the Arizona court's decision that an electronically recorded telephone call does not qualify as "written notice" conflicts with the New Mexico opinion in *Jordan* that the selection of insurance coverage from "pull-down menus" on a website *does* qualify as a written rejection of UM/UIM coverage.

In *Jordan*, Diana Lucero purchased her insurance through Progressive Halcyon Insurance Company's ("Progressive Halcyon") website. *Jordan*, 2010-NMSC-051, ¶ 10. Progressive Halcyon's website uses customer-entered information to suggest an insurance package, which the customer can alter using "pull-down menus." *Id.* In her online application, Ms. Lucero clicked on liability limits of $50,000 per person. *Id.* While Progressive Halcyon's suggested packages provide default UM/UIM coverage equal to

the liability limits, customers can purchase lesser amounts of UM/UIM coverage by using a pull-down menu. *Id.* Diana Lucero clicked on the minimum amount of UM/UIM coverage available, $25,000 per person. *Id.*

Consuelo Lucero, who was covered by the Progressive Halcyon policy, was injured in an accident with an underinsured motorist. *Id.* ¶ 12. Progressive paid Consuelo Lucero $50,000 in UM/UIM benefits, computed by stacking $25,000 for each of three cars, from which the other driver's $25,000 policy coverage was deducted. *Id.*

Under New Mexico law, "[t]he named insured shall have the right to reject uninsured motorist coverage. . . ." N.M. Stat. Ann. § 66-5-301(C) (1978). In addition, "[t]he rejection of the provisions covering damage caused by an uninsured or unknown motor vehicle as required *in writing* by the provisions of Section 66-5-301 NMSA 1978 must be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance." Regulation 13.12.3.9, N.M. Admin. Code (emphasis added). In *Jordan*, the New Mexico Supreme Court explained the import of the foregoing requirements as follows:

> UM/UIM coverage equal to the liability limits is the default coverage unless an insurer (1) offers the insured UM/UIM coverage equal to the policy's liability limits, (2) provides premium costs corresponding to the

> available levels of UM/UIM coverage, (3) obtains a *written rejection* of UM/UIM coverage equal to the liability limits, and (4) makes that rejection a part of the policy that is delivered to the insured.

Jordan, 2010-NMSC-051, ¶ 30 (emphasis added).

Under these facts, the *Jordan* court acknowledged that "*Diana Lucero rejected coverage in writing, recognizing that in the twenty-first century actively selecting an amount of UM/UIM coverage on an insurance website constitutes a 'writing.'*" *Id.* ¶ 34 (emphasis added) (citing *Marckstadt v. Lockheed Martin Corp.*, 147 N.M. 678, 686, 228 P.3d 462, 470, 2010-NMSC-001, ¶ 24 (N.M. 2009) (quoting BLACK'S LAW DICTIONARY 1748 (9th ed. 2009) (defining "'writing' as '[a]ny intentional recording of words that may be viewed or heard with or without mechanical aids'")). The *Jordan* court praised Progressive Halcyon for its "commendable system of offering meaningful choices to its insureds." *Id.* ¶ 35. Nevertheless, the court held that full compliance with the requirements of the law was not achieved, and that the attempted rejection of coverage was invalid, because Diana Lucero's rejection was not "endorsed, attached, stamped or otherwise made a part of the policy" as required by Regulation 13.12.3.9, N.M. Admin. Code. *Id.* More significantly for present purposes, the New Mexico Supreme Court failed to address E-SIGN or federal preemption.

Thus, in the context of UM/UIM coverage selection, electronic records are a "commendable system"

in New Mexico, while they are unenforceable in Arizona. The decisions of the New Mexico and Arizona courts are inconsistent in both their results and their reasoning. Further, both states refuse to acknowledge the preemptive effect of E-SIGN. Therefore, this Court should grant certiorari and reverse the Arizona Court of Appeals' decision, in order to restore the uniform acceptance of electronic records which Congress sought to achieve when it enacted E-SIGN.

IV. Courts and Administrative Agencies Have Reached Conflicting Conclusions Regarding the Validity and Enforceability of Electronic Records of Oral Communications.

Courts and administrative agencies nationwide have come to conflicting conclusions regarding the validity and enforceability of electronic records of oral communications. This Court should accept review on a writ of certiorari in order to resolve these conflicts.

In *In re Marriage of Takusagawa*, 38 Kan. App. 2d 401, 410, 166 P.3d 440, 446-47 (Kan. Ct. App. 2007), the Kansas Court of Appeals held that the statute of frauds did not prevent the enforcement of an oral divorce settlement, which involved the transfer of interests in land. The court reasoned that the agreement and the wife's oral assent thereto were recited orally and on the record in open court:

> Kansas' adoption in 2000 of the Uniform Electronic Transactions Act (UETA), K.S.A. 2006 Supp. 16-1601 *et seq.*, probably *makes Mieko's in-court statement the legal equivalent of a written signature for purposes of the statute of frauds*. The record does not disclose the type of equipment used by the court reporter, but it would be quite rare today for a court reporter's equipment not to at least require electricity. The UETA deems records generated by electronic means, including the use of electrical or digital magnetic capabilities, to be electronic records. K.S.A. 2006 Supp. 16-1602(f), (h). The UETA also deems any electronic sound or symbol "adopted by a person with the intent to sign the record" to be an "electronic signature." K.S.A. 2006 Supp. 16-1602(i). The UETA then provides that when a law requires a record or a signature to be in writing, an electronic record or signature will satisfy the law. K.S.A. 2006 Supp. 16-1607(c), (d). Thus, assuming that the court reporter's equipment was consistent with modern practice, it would appear that the *electronic capture of Mieko's oral assent that this was the agreement would satisfy the statute of frauds*. No more is needed to show that Mieko made or adopted the agreement.

Takusagawa, 38 Kan. App. 2d at 410, 166 P.3d at 446-47 (emphasis added) (citing 4 Brown, CORBIN ON CONTRACTS § 23.1A (Supp.2007)); *see also Londono v. City of Gainesville*, 768 F.2d 1223, 1227 (11th Cir. 1985) ("[T]he tape recording of the City Commission's

action at the meeting satisfies the statute of frauds requirement of a signed writing."); *Ellis Canning Co. v. Bernstein*, 348 F. Supp. 1212, 1228 (D. Colo. 1972) (holding that tape recorded oral contract satisfied "writing" requirement of statute of frauds); *cf. People v. Avila*, 770 P.2d 1330 (Colo. Ct. App. 1988) (finding recording on computer disk was a "writing" for purposes for forgery statute); *Friedman v. Clark*, 248 A.2d 867 (Md. 1969) (concluding that testimony recorded in open court will, under appropriate circumstances, take case out of statute of frauds).

Various administrative agencies have also embraced the validity of oral communications as electronic records. In response to an inquiry from the Mississippi Secretary of State, the Mississippi Attorney General issued an opinion that a voice record created or adopted by a person may constitute an "electronic signature" under UETA, within the context of a computer generated document in an Internet application. Miss. Op. Att'y Gen. No. 2002-0161, 2002 WL 1057931, at *1-2 (Apr. 19, 2002). The Nevada Division of Insurance listed its telephone number as one of the possible "addresses" to which a petitioner may validly submit a "written request . . . by electronic means" for a hearing with the Appeals Panel for Industrial Insurance. *See* Nev. Admin. Code 616B.9916. In New York, the Office of General Counsel representing the view of the State Insurance Department issued an official opinion that a life insurance agent may "have an applicant sign a life insurance application by the entry of their social

security number into an interactive voice response (IVR) system using a telephone keypad." N.Y. Gen. Counsel Op. 8-18-2004 (#8). The opinion stated that "[b]oth federal E-Sign and [New York's Electronic Signature and Records Act, N.Y. State Tech. Law § 301 *et seq.* (McKinney)] authorize the use and acceptance of electronic signatures and electronic records in commercial transactions, and confirm their legal validity." *Id.* Likewise, the Attorney General of Ohio issued an official opinion concluding that an audio tape recording of a meeting of a board of township trustees that is created by the township fiscal officer for the purpose of taking notes to create an accurate record of the meeting, is a public record, where the term "record" is statutorily defined to include electronic records. 2008 Ohio Op. Att'y Gen. 2-203, Op. No. 2008-019, 2008 WL 2454889, at *1-2 (June 16, 2008).

By contrast, in *Sawyer v. Mills*, 295 S.W.3d 79, 87-88 (Ky. 2009), the Supreme Court of Kentucky held that the statute of frauds applied and barred enforcement of an employer's oral agreement to pay his employee a $1,065,000 bonus. The court held that E-SIGN did not preempt the statute of frauds' writing requirement, notwithstanding the presence of an audio tape recording of the subject conversation between the employee and her employer. *Id.* The Supreme Court of Alabama reached a similar result in *Parker v. Williams*, 977 So. 2d 476, 480-81 (Ala. 2007), holding that the statute of frauds applied to an alleged guarantee of a loan, despite the fact that the

oral agreement was apparently captured on audio tape. The Alabama court failed to even acknowledge E-SIGN or Alabama's enactment of UETA.[14]

The results in *Sawyer* and *Parker* are similar to the Arizona court's refusal to recognize the validity of electronic records of oral communications in this case. This Court should grant certiorari in order to provide necessary guidance to businesses and to courts and agencies at the state and federal level, regarding the enforceability of electronic records of oral communications.

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[14] *See* Ala Code §§ 8-1A-1 *et seq.*

CONCLUSION

For the foregoing reason, the Petition for A Writ of Certiorari should be granted. Alternatively, the Court should grant certiorari and summarily reverse.

Respectfully submitted,

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff-Appellant, v. ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; Giant Electric Corporation, an Arizona corporation, Defendants-Appellees.	1 CA-CV 09-0065 DEPARTMENT E **OPINION** (Filed May 20, 2010)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-012149

The Honorable Robert H. Oberbillig, Judge

AFFIRMED

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HALL, Judge

¶1 In this appeal, we apply the Arizona Revised Statutes (A.R.S.) section 20-259.01 (Supp. 2009) provision requiring an insurer to extend a written notice offering uninsured motorist coverage to an insured in an amount equal to the insured's liability coverage. The superior court held that a recording of a telephone conversation concerning such coverage failed to satisfy the written notice requirement and granted summary judgment to the insured. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On November 12, 2001, Christopher W. Thompson (Thompson) called Progressive Casualty Insurance Company's (Progressive) 1-800 number to purchase an auto insurance policy for his company, Giant Electric Corporation (Giant). Progressive electronically recorded Thompson's conversation with its agent, Victoria.

¶3 Giant had never obtained an insurance quote from Progressive before that date. At the time of Thompson's call, Giant had a $1,000,000 policy with Hartford Insurance Company of the Midwest that included $1,000,000 of uninsured motorist (UM) and

underinsured motorist (UIM) coverage. The recorded exchange about the Hartford policy provides in relevant part:

> **Thompson:** – that says uh, uninsured motorist one mil – , per accident one million dollars.
>
> **Victoria:** There you go. There you go. OK.
>
> **Thompson:** Underinsured motorist per accident one million dollars.
>
> **Victoria:** OK. OK. And that should be it, right? There's no other coverages?
>
> **Thompson:** He –
>
> **Victoria:** That's probably it. 'Cuz you're not getting, um, you're not getting full coverage on the vehicle. So there should be no comprehensive or collision.
>
> **Thompson:** No.
>
> **Victoria:** OK.
>
> **Thompson:** No, there's no other, uh –
>
> **Victoria:** Gotcha.
>
> **Thompson:** – no other coverages.
>
> **Victoria:** Gotcha. OK. One year 1,399. What are you, uh, being charged with the Hartford Insurance?

Later, Victoria and Thompson discussed ways to lower the premium:

> **Victoria:** Now one thing you may wanna – it's up, this is up to you. The uninsured and the underinsured motorist coverage where you said a million dollars.
>
> **Thompson:** Yeah.
>
> **Victoria:** Technically it's up to you. Those coverages don't have to be at a million.
>
> **Thompson:** Yeah.
>
> . . . .
>
> **Victoria:** I can get your rate down a little bit if you wanna reduce the coverage on the uninsured.
>
> **Thompson:** Well, I think that'd be worth lookin' at. Yeah.

Ultimately, Thompson chose $100,000 of UM/UIM coverage for Giant.

¶4 Progressive did not send a separate written notice to the insured offering to sell UM/UIM coverage in an amount equal to the insured's liability coverage.

¶5 Progressive issued a commercial auto policy (the Policy) to Giant effective January 5, 2001 to January 1, 2002. The Policy provided $1,000,000 in liability coverage, and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. Giant renewed the Policy over the succeeding years with the same UM/UIM coverage limits.

¶6 On September 12, 2006, Jose Palomera-Ruiz (Palomera-Ruiz) was a passenger in a Giant utility van driven by Manuel Jesus Armenta-Avena (Armenta-Avena) and insured under Giant's Policy. Palomera-Ruiz suffered fatal injuries following an accident caused by Jill Besey, an uninsured motorist.

¶7 On July 6, 2007, Progressive filed a complaint against Palomera-Ruiz's estate (the Estate), Giant, and Armenta-Avena seeking a declaratory judgment that the UM/UIM limits are $100,000 per claim and $300,000 in the aggregate. Giant and the Estate answered, and Progressive and the Estate filed cross-motions for summary judgment on whether Progressive had failed to provide a written offer of UM/UIM coverage and therefore $1,000,000 in UM/UIM coverage existed as a matter of law. Following oral argument, the superior court granted summary judgment in favor of the Estate.

¶8 Progressive appealed. Because the initial judgment did not resolve the claims with respect to all parties, this court held that it lacked jurisdiction to consider the appeal. Accordingly, Progressive obtained an amended judgment that included Armenta-Avena and Giant and then filed this appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶9 We review the grant of summary judgment de novo. *Wallace v. Casa Grande Union High Sch. Dist. No. 82*, 184 Ariz. 419, 424, 909 P.2d 486, 491 (App.

1995). Summary judgment is warranted when "the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1).

¶10 This case requires us to construe A.R.S. § 20-259.01, Arizona's Uninsured Motorist Act (UMA). In 2001, A.R.S. § 20-259.01(A) provided in relevant part regarding UM coverage:

> Every insurer writing automobile liability or motor vehicle liability policies shall make available to the named insured thereunder and *by written notice offer the insured* and at the request of the insured shall include within the policy uninsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy. The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director is valid for all insureds under the policy. The offer need not be made in the event of the reinstatement of a

> lapsed policy or the transfer, substitution, modification or renewal of an existing policy.[1]

(Emphasis added). Section 20-259.01(B) contained a virtually identical provision concerning UIM coverage.

¶11 This statute, like all other Arizona insurance statutes, is incorporated into every policy issued to an Arizona insured. *Ins. Co. of N. Am. v. Superior Court*, 166 Ariz. 82, 85, 800 P.2d 585, 588 (1990). When an insurer fails to comply with A.R.S. § 20-259.01, the appropriate remedy is to impose UM and UIM coverage in an amount equal to the bodily injury liability limits of the policy. *Id.* at 85-86, 800 P.2d at 588-89.

¶12 The lynchpin of this case is the interpretation of the term "written notice" in A.R.S. § 20-259.01(A) and (B). Progressive contends that the requirement that an offer of UM/UIM motorist insurance in limits equal to those of liability coverage be provided by "written notice" should be interpreted "flexibly" in light of new technologies and business models in the insurance industry that enable consumers to purchase insurance either through the Internet or toll-free telephone numbers. According to Progressive, these trends support its argument that the statutorily required notice need not necessarily be in writing; rather the

---

[1] At issue in this case is a renewal of an existing policy. For a renewal to excuse the absence of a written offer, the policy must be properly issued in the first instance. *Estate of Ball v. Am. Motorists Ins. Co.*, 181 Ariz. 124, 127 n.3, 888 P.2d 1311, 1314 n.3 (1995).

intent of the statute is satisfied by the electronic recording of a telephone conversation such as occurred here.

¶13 Progressive's argument turns accepted principles of statutory interpretation on their head. Although the goal of statutory interpretation is to determine legislative intent, *In re Estate of Winn*, 214 Ariz. 149, 151, ¶ 8, 150 P.3d 236, 238 (2007), we do so by following the "cornerstone" principle that the "best and most reliable index of a statute's meaning is its language, and when the language is clear and unequivocal it is determinative of the statute's construction." *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). We interpret a statute contrary to its plain meaning "only if necessary to effectuate the legislature's clearly expressed contrary intent or to avoid an absurd result that the legislature could not in any event have intended." *Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 444, 937 P.2d 363, 366 (App. 1996).

¶14 Section 20-259.01 does not define "written." The general definition statute, A.R.S. § 1-215(46) (2002 & Supp. 2009), defines "writing" only as "includes printing." Words in statutes are given "their usual and commonly understood meaning unless the legislature clearly intended a different meaning." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). As commonly understood, the term "writing" does not encompass an electronic recording of a telephone conversation. *See Black's Law Dictionary* 1108 (6th ed. 1991) ("In the most general sense of the word,

'writing' denotes a document, whether manuscript or printed, as opposed to mere spoken words."). Progressive points out that "writing" is specifically defined in other unrelated contexts as including an electronic recording. *See, e.g.*, Ariz. R. Evid. 1001(1). We presume, however, that had the legislature intended that the term "written notice" include electronic voice recordings, it would have said so. Therefore, the plain meaning of "written notice" requires that the offer be communicated in writing.[2]

¶15 Progressive nonetheless argues that, as a matter of policy, we should construe the requirement of written notice broadly to permit oral notifications that are electronically recorded because doing so satisfies the purpose of the UMA, which is "to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others." *Ormsbee v. Allstate Ins. Co.*, 176 Ariz. 109, 112, 859 P.2d 732, 735 (1993). We decline to do so.

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[2] We likewise find unavailing Progressive's claim that the recorded telephone conversation qualifies as a written notice in light of (1) the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 to 7006 (2000) (E-SIGN); and (2) the Arizona Electronic Transaction Act, A.R.S. §§ 44-7001 to -7051 (AETA) (2003 & Supp. 2008). Even if the electronic recording at issue qualifies as a "writing" in other contexts, neither it nor any other type of written notice was provided to the insured. Here, because the only notice Progressive extended to the insured was oral, it failed to satisfy A.R.S. § 20-259.01's express requirement of a "written notice."

¶16 There is nothing in the legislative history of the UMA that supports a clearly expressed legislative intent that the term "written notice" be interpreted as requiring something different than *actual* written notice. As the superior court observed, the ability to record telephone conversations is not a recent innovation. The technology was available prior to 1981 when the requirement of written notice was first added and digital recording became available at least by 1982. *See* http://home.intekom.com/restore/History_Recording.html (last accessed May 4, 2010). Notwithstanding this recording option, the Arizona Legislature enacted a written notice requirement and re-enacted it without change.[3] Progressive's argument thus supplies no reason to depart from the text of the UMA.

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[3] The Arizona Legislature enacted A.R.S. § 20-259.01 in 1965. 1965 Ariz. Sess. Laws, ch. 34, § 1. In 1981, it amended the statute to require insurers to automatically include UM coverage of $15,000 in every policy and to notify the insured in writing that he could purchase up to the limits of the insured's liability coverage. 1981 Ariz. Sess. Laws, ch. 224, § 1. The Legislature again amended the statute in 1993 to eliminate the requirement that all liability policies include UM coverage. 1993 Ariz. Sess. Laws, ch. 1, § 3 (5th Spec. Sess.) "However, in exchange for eliminating the coverage as compulsory, insurers were required to 'make available . . . and by written notice offer' UM and UIM coverage in limits 'not less than the liability limits for bodily injury or death contained within the policy.'" Note, *Legislative Review: S.B. 1445 – The Legislature's Attempt To Reverse Judicial Treatment Of Uninsured And Underinsured Motorist Coverage In Arizona*, 30 Ariz. St. L.J. 469, 478 (Summer 1998) (citing 1993 Ariz. Sess. Laws, ch. 1, § 3). Between 1996 and 2003, the Arizona Legislature has repeatedly amended A.R.S. § 20-259.01 but has left the written notice provision

(Continued on following page)

¶17 Nor can it be said that a literal interpretation of "written notice" leads to an absurd result or otherwise frustrates the legislature's intent. Quite the contrary. An oral notification obviously cannot be read and does not provide the same opportunity for review as does a written notice, and the insured is therefore less likely to comprehend the significance of what is being offered if he does not receive the offer in writing. *See Giley v. Liberty Mut. Fire Ins. Co.*, 168 Ariz. 306, 306-07, 812 P.2d 1124, 1124-25 (App. 1991) (rejecting claim that agent's act of orally describing notice and obtaining insured's signature on a form kept by agent satisfied the "make available" and "by written notice offer" terms in A.R.S. § 20-259.01). Here, Progressive kept the recording in its files and did not provide it to Thompson or Giant as a written notice. Indeed, Thompson received nothing to memorialize the oral offer's communication to him, not a recording, a letter, an e-mail, or a receipt.

¶18 Although the recording provides reliable evidence of what was said in the pertinent conversation, Progressive did not satisfy the statutory requirement that a "written notice" of the offer be provided. This omission results in an expansion of Giant's UM coverage by operation of law. *See Estate of Ball*, 181 Ariz. at 127, 888 P.2d at 1314 (refusing to create a

---

unchanged *See* 1996 Ariz. Sess Laws, ch 164, § 1; 1997 Ariz Sess. Laws, ch 1, § 39, 1997 Ariz. Sess. Laws, ch. 87, § 1; 1997 Ariz Sess. Laws, ch 125, § 1; 1998 Ariz. Sess. Laws, ch 288, § 2; 2003 Ariz Sess Laws, ch 86, § 1.

waiver exception to A.R.S. § 20-259.01(B): "The statutory requirement of a written offer is absolute on its face.").

CONCLUSION

¶19 We therefore affirm the grant of summary judgment to the Estate.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge

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SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation,

Plaintiff,

vs.

GIANT ELECTRIC CORPORATION, an Arizona Corporation; ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; and MANUEL JESUS ARMENTA-AVENA; a single man,

Defendants.

No. CV2007-012149

~~[PROPOSED]~~ **JUDGMENT FOR DEFENDANTS PALOMERA-RUIZ AND GIANT ELECTRIC**

(Filed Nov. 25, 2008)

(Assigned to Honorable Robert Oberbillig)

Plaintiffs Complaint sought a Declaratory Judgment that the Progressive auto insurance policy issued to Defendant Giant Electric has as a matter of law $100,000.00 of uninsured and underinsured motorist coverage, at the time of the September 12, 2006 motor vehicle accident.

The Defendant Palomera-Ruiz filed a Motion for Summary Judgment and the Plaintiff Progressive Casualty filed a Cross Motion. Defendant Giant Electric did not join in Palomera-Ruiz's Motion nor did Giant Electric oppose Progressive's Cross Motion. The Court having reviewed the Defendant Palomera-Ruiz's Motion for Summary Judgment, the Response of Plaintiff Progressive Casualty, the Cross Motion for Summary Judgment of Plaintiff Progressive Casualty, Defendant Palomera-Ruiz's Response and the Plaintiff Progressive Casualty's Reply, and having heard on April 14, 2008 the oral arguments on the motions;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, granting the Defendant Palomera-Ruiz's Motion for Summary Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, denying the Plaintiff Progressive Casualty's Cross Motion for Summary Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiff Progressive Auto Insurance policy issued to Defendant Giant Electric as a matter of law $1,000,000.00 of uninsured and underinsured motorist coverage, at the time of the September 12, 2006 motor vehicle accident.

DONE IN OPEN COURT this 25 day of ~~October~~, [NOV] 2008.

/s/ Robert Oberbillig
Honorable Robert Oberbillig
Maricopa County Superior
Court Judge

COPY of the foregoing mailed
this same date to:

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Supreme Court

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RACHELLE M. RESNICK
CLERK OF THE COURT

SUZANNE D. BUNNIN
CHIEF DEPUTY CLERK

October 28, 2010

RE: PROGRESSIVE v ESTATE OF JOSE PALOMERA-RUIZ et al
Arizona Supreme Court No. CV-10-0176-PR
Court of Appeals Division One No. 1 CA-CV 09-0065
Maricopa County Superior Court No. CV2007-012149

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 26, 2010, in regard to the above-referenced cause:

ORDERED: Plaintiff's/Appellant's Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellant Progressive Casualty Insurance] = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 28th day of October, 2010.

Rachelle M. Resnick, Clerk

TO:
John K Wittwer
Frank E Lesselyong
Ruth Willingham
bjt

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Electronic Signatures in Global and National Commerce Act**, 15 U.S.C. § 7001 *et seq.* ("**E-SIGN**") provides in pertinent part:

§ 7001. General rule of validity

(a) In general

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

(b) Preservation of rights and obligations

This subchapter does not –

(1) limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or

other records be written, signed, or in non-electronic form; or

(2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.

(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if –

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent;

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement –

(i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

(C) the consumer –

(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and

(D) after the consent of a consumer in accordance with subparagraph (A), if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record

that was the subject of the consent, the person providing the electronic record –

(i) provides the consumer with a statement of (I) the revised hardware and software requirements for access to and retention of the electronic records, and (II) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under subparagraph (B)(i); and

(ii) again complies with subparagraph (C).

(2) Other rights

(A) Preservation of consumer protections

Nothing in this subchapter affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

(B) Verification or acknowledgment

If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

(3) Effect of failure to obtain electronic consent or confirmation of consent

The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii).

(4) Prospective effect

Withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with paragraph (1) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with paragraph (1)(D) may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this paragraph.

(5) Prior consent

This subsection does not apply to any records that are provided or made available to a consumer who has consented prior to the effective date of this subchapter to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

(6) Oral communications

An oral communication or a recording of an oral communication shall not qualify as an electronic

record for purposes of this subsection except as otherwise provided under applicable law.

* * *

(e) Accuracy and ability to retain contracts and other records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

* * *

(i) Insurance

It is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance.

* * *

§ 7002. Exemption to preemption

(a) In general

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law –

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if –

(i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.

* * *

(c) Prevention of circumvention

Subsection (a) of this section does not permit a State to circumvent this subchapter or subchapter II of this chapter through the imposition of

nonelectronic delivery methods under section 8(b)(2) of the Uniform Electronic Transactions Act.

§ 7003. Specific exceptions

(a) Excepted requirements

The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by –

(1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or

(3) the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 and 2A.

(b) Additional exceptions

The provisions of section 7001 of this title shall not apply to –

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

(2) any notice of –

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

§ 7004. Definitions

For purposes of this subchapter:

* * *

(2) Electronic

The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

* * *

(4) Electronic record

The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

(5) Electronic signature

The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

* * *

(9) Record

The term "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

* * *

The **Uniform Electronic Transactions Act ("UETA")**, as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, provides in pertinent part:

UETA § 2. Definitions.

In this [Act]:

* * *

(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

* * *

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

* * *

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

* * *

UETA § 3. Scope.

(a) Except as otherwise provided in subsection (b), this [Act] applies to electronic records and electronic signatures relating to a transaction.

(b) This [Act] does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];

(3) [the Uniform Computer Information Transactions Act]; and

(4) [other laws, if any, identified by State].

(c) This [Act] applies to an electronic record or electronic signature otherwise excluded from the application of this [Act] under subsection (b) to the extent it is governed by a law other than those specified in subsection (b).

(d) A transaction subject to this [Act] is also subject to other applicable substantive law.

UETA § 6. Construction and Application.

This [Act] must be construed and applied:

(1) to facilitate electronic transactions consistent with other applicable law;

(2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

UETA § 7. Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

UETA § 8. Provision of Information in Writing; Presentation of Records.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this [Act] requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this [Act] to send, communicate, or transmit a record by [first-class mail, postage prepaid] [regular United States mail], may be varied by agreement to the extent permitted by the other law.

Arizona's Uniform Electronic Transaction Act, Ariz. Rev. Stat. § 44-7001 *et seq.* ("AETA"), provides in pertinent part:

§ 44-7002. Definitions

In this chapter, unless the context otherwise requires:

1. "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations and procedures that are given the effect of agreements under laws otherwise applicable to a particular transaction.

* * *

5. "Electronic" means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities.

* * *

7. "Electronic record" means a record that is created, generated, sent, communicated, received or stored by electronic means.

8. "Electronic signature" means an electronic sound, symbol or process that is attached to or logically associated with a record and that is executed or adopted by an individual with the intent to sign the record.

* * *

13. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and that is retrievable in perceivable form.

* * *

§ 44-7003. Scope

A. Except as otherwise provided in subsection B of this section, this chapter applies to any

electronic record and electronic signature relating to a transaction.

B. This chapter does not apply to a transaction to the extent the transaction is governed by:

1. Title 14[1] as it relates to the creation and execution of wills, codicils or testamentary trusts.

2. Title 47,[2] other than chapters 2[3] and 2A[4] and § 47-1306 and as otherwise provided in § 44-7016.

C. This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under subsection B of this section to the extent the record or signature is governed by a law other than those laws described in subsection B of this section.

D. Any transaction subject to this chapter is also subject to any other applicable substantive law.

§ 44-7005. Use of electronic records and signatures; variation by agreement

A. This chapter does not require a record or signature to be created, generated, sent, communicated, received or stored or otherwise processed or used by electronic means or in electronic form.

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[1] Section 14-1101 et seq

[2] Section 47-1101 et seq

[3] Section 47-2101 et seq.

[4] Section 47-2A101 et seq

B. This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

C. A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

D. Except as provided in subsection C and otherwise provided in this chapter, the effect of any of the provisions of this chapter may be varied by agreement. The words "unless otherwise agreed", or other similar words, as used in this chapter do not imply that the effect of other provisions may not be varied by agreement.

E. Whether an electronic record or electronic signature has legal consequences is determined by this chapter and any other applicable law.

§ 44-7006. Construction; application

This chapter shall be construed and applied to:

1. Facilitate electronic transactions consistent with other applicable law.

2. Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.

3. Effectuate its general purpose to make uniform the law of this state with respect to the subject of this chapter for intrastate, interstate and international transactions.

§ 44-7007. Legal recognition of electronic records, signatures and contracts

A. A record or signature in electronic form cannot be denied legal effect and enforceability solely because the record or signature is in electronic form.

B. A contract formed by an electronic record cannot be denied legal effect and enforceability solely because an electronic record was used in its formation.

C. An electronic record satisfies any law that requires a record to be in writing.

D. An electronic signature satisfies any law that requires a signature.

§ 44-7008. Provision of information in writing; presentation of records

A. If the parties to a transaction have agreed to conduct the transaction by electronic means and a law requires a person to provide, send or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent or delivered, as the case may be, in an electronic record that is capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or the sender's information

processing system inhibits the ability of the recipient to print or store the electronic record.

B. If a law other than this chapter requires a person to post or display a record in a certain manner, to send, communicate or transmit a record by a specified method or to format information in a record in a certain manner, the following requirements apply:

1. The record shall be posted or displayed in the manner prescribed in that law.

2. Except as otherwise provided in subsection D, paragraph 2, the record shall be sent, communicated or transmitted by the method prescribed in that law.

3. The record shall contain the information formatted in the manner prescribed in that law.

C. If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

D. The parties to the transaction shall not vary the requirements of this section, except that to the extent a law other than this chapter requires:

1. Information to be provided, sent or delivered in writing but allows that requirement to be varied by agreement, the parties may agree to vary the requirement prescribed in subsection A that the information be in the form of an electronic record capable of retention.

2. A record to be sent, communicated or transmitted by postage prepaid first class mail or

regular mail but allows that requirement to be varied by agreement, the parties may agree to vary the requirement to the extent allowed by the other law.

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff, vs. GIANT ELECTRIC CORPORATION, an Arizona Corporation; ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; and MANUEL JESUS ARMENTA-AVENA; a single man, Defendants.	No. CV2007-012149 **PROGRESSIVE CASUALTY INSURANCE COMPANY'S RESPONSE IN OPPOSITION TO DEFENDANT PALOMERA-RUIZ'S MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 7, 2007) (Assigned to Hon. Bethany G. Hicks) (Oral Argument Requested)

Progressive Casualty Insurance Company ("Progressive"), through undersigned counsel, and pursuant to Ariz. R. Civ. P. 56, hereby submits its Response in Opposition to Defendant Palomera-Ruiz's Motion for Summary Judgment and Cross-Motion for Summary Judgment (collectively, "Response MSJ"). Defendant Palomera-Ruiz is not entitled to summary judgment because, the electronic copy of the UM/UIM offer satisfies the legislative intent in enacting A.R.S. § 28-259.01 and the judicial decision of *Ball v. American Motorist Insurance Company*, 181 Ariz. 124, 888 P.23d 1311 (1995), by, among other things, avoiding credibility contests. Progressive also incorporates by reference its Cross-Motion for Summary Judgment ("Cross MSJ") filed contemporaneously herewith. This Response MSJ is supported by the attached Memorandum of Points and Authorities and Progressive's Response to Defendant's Statement of Facts/ Separate Statement of Facts, filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 12, 2001, Progressive received a telephone call from Christopher W. Thompson, the President/CEO of Giant Electric, applying for insurance with Progressive. [RSOF ¶ 8]. The telephone conversation was electronically recorded. [RSOF ¶ 9]. Mr. Thompson requested liability insurance in the amount of $1,000,000. [RSOF ¶ 10]. During the

conversation, Mr. Thompson informed Progressive that his previous policy with Hartford Insurance Company of the Midwest had $1,000,000 of uninsured motorist and underinsured motorist (UM/UIM) coverage. [RSOF ¶ 11]. During the conversation, Mr. Thompson was informed that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. [RSOF ¶ 12]. During the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. [RSOF ¶ 13]. During the conversation, Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. [RSOF ¶ 14]. In response, Mr. Thompson chose $100,000 of UM/UIM coverage. [RSOF ¶ 15]. Thereafter, Progressive issued a commercial auto policy to Giant Electric for the policy term of January 5, 2001 through January 1, 2002. [RSOF ¶ 16]. The policy provided coverage with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. [RSOF ¶ 17]. The policy was renewed for successive years with the same UM/UIM coverage limits. [RSOF ¶ 18].

II. ARGUMENT

A. Progressive Satisfied the UIM Statute.

Defendant Palomera-Ruiz relies heavily on A.R.S. § 20-259.01(B) and ***Ball v. American Motorist Insurance Company***, 181 Ariz. 124, 888 P.23d 1311 (1995), for the proposition that the UM/UIM offer

made to Giant Electric should not be given legal effect because the offer was not in writing. Defendant Palomera-Ruiz's contention is meritless and is based upon a misunderstanding of the current state of law in Arizona and the purpose behind A.R.S. § 20-259.01(B). A.R.S. § 20-259.01(B) provides in relevant part:

> Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and *shall by written notice offer* the insured and at the request of the insured shall include within the policy underinsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy.

(emphasis added).

The 1981 amendment to the statute originally required that insurers offer UM/UIM coverage by written notice. ***Tallent v. National General Ins. Co.***, 185 Ariz. 266, 311, 915 P.2d 665, 619 (1996) (Toci, J., *dissenting*), Joel DeCiancio, *Legislative Review S.B. 1445 – The Legislature's Attempt to Reverse Judicial Treatment of Uninsured and Underinsured Motorist Coverage in Arizona*, 30 ARIZ. ST. L.J. 469, 472 (1998) (discussing history of UM/IIM insurance in Arizona) (hereinafter "*Legislative Review*"). A.R.S. § 20-259.01 has had a written notice requirement in one form or another for nearly twenty-seven (27)

years. This written notice requirement, however, is based upon the old model of insurance business rather than the new digital, business model previously discussed.

The Arizona Supreme Court has determined that the intent of the legislature in enacting A.R.S. § 20-259.01 was "to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others." ***Ball***, 181 Ariz. 124, 126-27, 888 P.2d at 1313-14 (quoting ***Ormsbee v. Allstate Ins. Co.***, 176 Ariz. 109, 859 P.2d 732 (1993)). This intent requires "that all persons who purchase automobile liability insurance be offered in writing the option to purchase additional . . . UIM coverage in limits up to those they choose for their bodily injury liability coverage." ***State Farm Mut. Auto. Ins. Co. v. Ash***, 181 Ariz. 167, 172, 888 P.2d 1354, 1359 (Ct. App. 1994); *see also Legislative Review*, 30 ARIZ. ST. L.J. at 484-85 ("With the mandatory offer intact, the courts will likely hold that the legislature targeted these coverages so that consumers could make informed decisions on whether to purchase, and in what amounts, protection for their families against irresponsible drivers.").

Defendant Palomera-Ruiz mistakenly argues that "[a]nything short of a written offer does not meet the statutory requirements." [Motion at p. 2 lns. 21-22]. Defendant's reliance on ***Ball*** is misplaced because ***Ball*** is factually distinguishable. In ***Ball***, the carrier contended that the UM/UIM requirement was waived, both in writing and orally. The insured

agreed. However, that assertion was based upon affidavits attached to a motion for summary judgment, where the risk manager testified that the insured company did not want and would have rejected any offer of UIM coverage. The carrier argued that when the insurer and named insured agree that the named insured did not want UIM, and the named insured so informed the insurer, the written offer requirement is waived. In ***Ball*** (a case decided in 1995 before the digital age), Justice Martone held that the written notice requirement "is the only sure and uniform way to avoid credibility contests over whether such an offer was actually made." 181 Ariz. at 128, 888 P.2d at 1315.

The ***Ball*** case is factually distinguishable because it relied upon affidavits that were prepared years after the event in question when the UM/UIM offer was made. The affidavits were prepared for trial. Under that circumstance, the veracity of the affidavits could be questioned because they were imperfect recollections of what occurred years earlier and may not constitute an accurate recordation of what occurred. The affidavits were also subject to manipulation because the parties (insured and carrier) could conspire together to deprive the injured claimant of the benefits of the policy.

No such credibility issues arise in this case. A contemporaneous electronic recording of the conversation where the UM/UIM offer is made to Giant Electric is not subject to imperfect recollections years later by the parties. The electronic recording is an

accurate recordation of the events as they transpired. This Court can review the recording (and the transcript of the recording) to determine exactly what was said by Progressive and by Giant Electric. This is no different from the electronic recordings made during court proceedings to obtain an accurate recollection of the events that transpired. As a result, an electronic recordation is not subject to post-accident conspiracies by the parties that Justice Martone expressed concerns about.

In fact, the electronic recording of the telephone conversation is more reliable than the written requirement. There is no assurance that the insured would have read a UM/UIM selection form and understood it before signing it. The insured could have been simply given the form and signed it. Under Arizona law, the Court must legally presume that the insured read the document and signed it after reading. In this case, the communications between Giant Electric and Progressive are recorded so that this Court can know for sure that the issue of UM/UIM coverage was discussed, the various coverage limits offered, and the desired coverage amount selected by the insured, Giant Electric. Consequently, the contemporaneous electronic recordation of the conversation is better evidence as compared to a written selection form.

Moreover, since ***Ball***, other jurisdictions have held that express rejection of UM/UIM coverage can be oral or written provided that the facts reliably demonstrate an intentional express rejection. See

e.g., ***Williams v. Nationwide Prop. & Cas. Ins. Co.***, 709 N.E.2d 907, 911-12 (Ohio Ct. App. 1998) (noting that "extrinsic evidence" has been submitted demonstrating the insured had expressly rejected equivalent uninsured motorist coverage). Like ***Williams***, in this case, Progressive has come forward with extrinsic evidence that reliably demonstrates an intentional express rejection by Giant Electric to reject UM/UIM limits of $1 million and to expressly select UM/UIM limits of $300,000. What information is more reliable than an electronic recording of the conversation held between Giant Electric and Progressive? This is not the situation where affidavits are prepared years later by the agent or the carrier regarding the offer. Hence, there is no credibility dispute over what was said and what was accepted/rejected because that can be verified by the electronic recording. Indeed, Defendant Palomera-Ruiz does not dispute that the electronic recording of the telephone conversation indicates that Giant Electric unequivocally rejected $1 million UM/UIM limits and selected lower limits. Instead, Defendant Palomera-Ruiz rests solely upon the *pro forma* argument that there was no written notice. This *pro forma* requirement has been soundly rejected by Congress and the Arizona legislature.

The undisputed evidence indicated that, during the conversation, Mr. Thompson, the President/CEO of Giant Electric, was informed by Progressive that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. The undisputed evidence

indicates that, during the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. The undisputed evidence indicates that, during the conversation, Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. In response, Mr. Thompson chose $100,000 of UM/UIM coverage. Thereafter, Progressive ıssued a commercial auto policy to Giant Electric for the policy term of January 5, 2001 through January 1, 2002, with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. The policy was renewed four (4) successive times with the same UM/UIM coverage limits.

Clearly, the UM/UIM offer made by Progressive satisfied the minimal requirements under the statute. See, e.g., ***State Farm Mut. Auto. Ins. Co. v. Ash***, 181 Ariz. 167, 174-75, 888 P.2d 1354, 1361-62 (Ariz. Ct. App. 1994). Progressive, in essence, "offer[ed] such coverage in a way reasonably calculated to bring to the insured's attention that which is being offered." ***Giley v. Liberty Mut. Fire Ins. Co.***, 168 Ariz. 306, 812 P.2d 1124 (Ct. App. 1991); see also ***Tallent***, 185 Ariz. at 267, 915 P.2d at 666. The electronic recording of the UM/UIM offer satisfied the purpose of ARS. § 20-259.01 and should be given legal effect. Consequently, Progressive is entitled to summary judgment in its favor, holding that the policy provides UM/UIM limits of $100,000 per claim and $300,000 in the aggregate.

IV. CONCLUSION

Based upon the foregoing, Progressive respectfully requests that this Court deny Defendant Palomera-Ruiz's motion for summary judgment. Instead, this Court should enter summary judgment in favor of Progressive, holding that the electronic recording of the UM/UIM selection should be given legal effect and that the policy provides UM/UIM limits of $100,000 per claim and $300,000 in the aggregate.

DATED this 7th day of December, 2007.

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff, vs. GIANT ELECTRIC CORPORATION, an Arizona Corporation; ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; and MANUEL JESUS ARMENTA-AVENA; a single man, Defendants.	No. CV2007-012149 **PROGRESSIVE CASUALTY INSURANCE COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 7, 2007) (Assigned to Hon. Bethany G. Hicks (Oral Argument Requested)

Progressive Casualty Insurance Company ("Progressive"), through undersigned counsel, and pursuant to Ariz. R. Civ. P. 56, hereby submits Cross-Motion for Summary Judgment ("Cross-MSJ"). Progressive is entitled to summary judgment in its favor because, similar to the new business model, Progressive made an electronic copy of the uninsured motorist coverage and underinsured motorist coverage ("UM/UIM") offer made to Giant Electric. The UM/UIM offer must be given legal effect pursuant to the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., and the Arizona Electronic Transactions Act, A.R.S. § 44-7001 et seq. The electronic copy of the UM/UIM offer also satisfies the legislative intent in enacting A.R.S. § 28-259.01 and the judicial decision of ***Ball v. American Motorist Insurance Company***, 181 Ariz. 124, 888 P.23d 1311 (1995), by, among other things, avoiding credibility contests. The electronic copy of the UM/UIM offer also satisfies the statute of frauds. Progressive also incorporates by reference its Response in Opposition to Defendant Palomera-Ruiz's Motion for Summary Judgment ("Response MSJ"). This Cross-MSJ is supported by the attached Memorandum of Points and Authorities and Progressive's Response to Defendant's Statement of Facts/Separate Statement of Facts, filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 12, 2001, Progressive received a telephone call from Christopher W. Thompson, the President/CEO of Giant Electric, applying for insurance with Progressive. [RSOF ¶ 8]. The telephone conversation was electronically recorded. [RSOF ¶ 9]. Mr. Thompson requested liability insurance in the amount of $1,000,000. [RSOF ¶ 10]. During the conversation, Mr. Thompson informed Progressive that his previous policy with Hartford Insurance Company of the Midwest had $1,000,000 of uninsured motorist and underinsured motorist (UM/UIM) coverage. [RSOF ¶ 11]. During the conversation, Mr. Thompson was informed that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. [RSOF ¶ 12]. During the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. [RSOF ¶ 13]. During the conversation, Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. [RSOF ¶ 14]. In response, Mr. Thompson chose $100,000 of UM/UIM coverage. [RSOF ¶ 15]. Thereafter, Progressive issued a commercial auto policy to Giant Electric for the policy term of January 5, 2001 through January 1, 2002. [RSOF ¶ 16]. The policy provided coverage with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000

in the aggregate. [RSOF ¶ 17]. The policy was renewed for successive years with the same UM/UIM coverage limits. [RSOF ¶ 18].

II. ARGUMENT

A. The UIM Statute Must Be Interpreted Flexibly in Light of New Technologies and Business Models in the Insurance Industry.

The insurance industry is much different today than it was when the current version of A.R.S. § 20-259.01(B) was originally enacted. The traditional role of an insurance agent in the sale of insurance products to potential policyholders changed dramatically over the years. Historically, the agent was the customer's first and only point of contact. However, due to a maturing market's slower growth in certain insurance areas, and the impact of increasing costs in doing business through agents, insurance companies sought new ways to increase profitability. Deborah S. Freeman, *Exploration of Policyholder Information Ownership Rights under the Three Existing Insurance Agency Systems in the United States,* 23 W. NEW ENG. L. REV. 409, 409 (2002) (hereinafter "*Policyholder Information*"). Insurance companies began to provide consumers with additional access points for insurance sales, including the Internet and direct insurance sales through toll-free telephone numbers. ***Id.*** ("In response, insurance companies have begun to provide consumers with additional access points for sales, such as the Internet. They are also trying to expand

their direct insurance sales through toll-free telephone numbers."). Today, the Internet and other new technologies, as well as the modern "direct writer" business model, have gained immense popularity.

Large insurers such as Progressive have increasingly used many different channels to sell insurance. *See* Insurance Information Institute, Glossary of Insurance Terms, available at http://www.iii.org/individuals/glossary/alfa.D/ (last visited 11/30/07). In the mid- to late-1990s, businesses began offering products on the Internet, and consumers were soon clamoring for online functionality for their insurance needs. *See* Practising Law Institute, *Fourth Annual Internet Law Institute: Remote Banking and Financial Services,* 610 PLI/PAT 809, 840-41 (June 2000) (hereinafter "*Internet Law Institute*"). In a recent survey conducted around the year 2000, "45% of computer-owning households reported they rarely or never visited an agent or broker in person." *Id.* at 839.

In 1999, Congress passed the Gramm-Leach-Bliley Act (Financial Services Modernization Act of 1999), Pub. L. No. 106-102, 1999 U.S.C.A.N. (113 Stat.) 1338, which eliminated significant barriers that had previously prevented banks from engaging in insurance activities. *See* Thomas Lee Hazen, *Fundamentals of Securities Law: Relation of Securities Laws to Other Laws,* SM052 ALI-ABA 23 (June 21-22, 2007). The Gramm-Leach-Bliley Act brought the insurance industry "under assault" from banks and other segments of the financial services industry. *See, e.g.,* Jerry W. Markham, *Banking Regulation: Its*

History and Future, 4 N.C. BANKING INST. 221, 221 (Apr. 2000). This competitive pressure, along with the growth of the Internet, "undermine[d] the role of the independent agents that previously were responsible for the delivery of much of the insurance products sold in America." *Id.* Consequently, many insurers began shifting from an "agency" business model to a "direct writer" model. Direct writers are insurance companies that "sell directly to the public using exclusive agents or their own employees," for example, by telephone or via the Internet. *See* Insurance Information Institute, Glossary of Insurance Terms, available at http://www.iii.org/individuals/glossary/alfa.D/ (last visited 11/30/07); *see also Internet Law Institute, supra,* at 837 (describing early efforts by Progressive to underwrite auto insurance risks and issue binders in minutes over the Internet); *Markham, supra,* at 275 ("Allstate Insurance Company announced in November of 1999 that it would be selling car and home insurance directly to consumers through the Internet and over the telephone."); *Policyholder Information,* 23 W. NEW ENG. L. REV. at 420 ("With the development of the Internet and e-commerce, many insurance companies anticipate soliciting potential policyholders online directly through their properly licensed employees, as order-takers only, with virtually no efforts on the part of those employees to generate that business.").

One commentator explained the cost advantages that direct writers gained by "cutting out the middleman" and utilizing mass media, including telephones, to issue policies:

> "Agency system insurers" have traditionally solicited business through intermediaries, such as company agency forces, independent agents, managing general agents, and brokers. Intermediaries typically earn commissions that are charged to the insurer at policy inception as "acquisition costs." These costs typically constitute a significant portion of an agency system insurer's policy expenses. "Direct writers," in contrast to agency system insurers, mass-market and issue policies directly to insureds (through mass media such as television, telephone, and the mail) without the use of intermediaries.

Internet Law Institute, supra, at 836.

In addition to cost factors, niche insurance companies such as USAA and GEICO were able to access specific populations, and "therefore, did not ever really need independent or exclusive insurance agents to obtain their customers." *Policyholder Information,* 23 W. NEW ENG. L. REV. 420-21 (2002). See also, ***20th Century Ins. Co. v. Garamendi,*** 8 Cal.4th 216, 257, 878 P.2d 566, 591, 32 Cal.Rptr.2d 807, 832 (Cal. 1994) (noting that 20th Century Insurance Company is a direct writer of insurance, and therefore did not employ or utilize captive or independent agents). This was yet another competitive

force which gave rise to the trend toward direct writers.

Furthermore, the direct writer system gained a foothold because it was a speedier way of doing business. For example, "for many personal lines insurance transactions, underwriting and policy issuance can occur almost instantaneously online." *Internet Law Institute, supra,* at 837; see also, John L. Romaker & Virgil B. Prieto, *Expectations Lost: Bank of The West v. Superior Court Places the Fox in Charge of the Henhouse,* 29 CAL. W. L. REV. 83, 135 (Fall 1992) (noting that insurance policies are purchased over the telephone). Obviously, telephone transactions provide many of these same speed advantages. Cf., *Mutual Funds and The Internet: Current Industry Practice, The New E-Signature Law, And Recent Sec Pronouncements,* SF33 ALI-ABA 25 (October 2000) ("recognizing that '[i]n today's markets, where speed is a priority, significant matters often are communicated telephonically,' and that 'business can be transacted as effectively over the telephone today as it can in paper'"). In fact, the policy in the case *sub judice* was approved instantly over the phone. As the direct writer system became pervasive, independent insurance agents expressed concern that they "may be headed the way of the milkman." *See* John R. Wilke & Leslie Seism, *Under the Gun: Insurance Agents Fight an Intrusion by Banks, But Other Perils Loom,* WALL ST. J., Aug. 8, 1995, at A1.

This new trend is not limited to the insurance industry. Similar technological advancement has spread to every aspect of life, including credit card companies, banks, and utilities, to name a few. Notably, the courts have also recognized and adopted new technologies. For example, electronic filing is mandatory in the federal court system and in some Arizona state court cases as well. Electronic courtroom displays are becoming more prevalent. *See* Samuel H. Solomon & Suzan Flamm, *Admissibility of Digital Exhibits in Litigation,* SM057 ALI-ABA 419 (Oct. 26-28, 2006). Status conferences and oral arguments are now often conducted telephonically. *See* Robert. V. Alvarado, Jr., *Telephonic Court Appearances: Reduce Litigation Costs the Easy Way,* 26-MAY AM. BANKR. INST. J. 34 (2006). This Court may take judicial notice that courts across the country, including Arizona, are moving from stenographic to digital recording of courtroom proceedings. *See* Helen W. Gunnarsson, *Making an Electronic Record: Good Reviews for Digital Recording,* 94 ILL. B.J. 72, 74 (Feb. 2006). Increased trustworthiness and reliability are major benefits of this technological shift. *Id.* ("Judges who preside over hearings that are electronically recorded . . . give the system high marks. [Quoting certain judges who agree that] the best thing about electronic recording is that it's '100 percent accurate' – even more so than live court reporters, who are required to pass a test with 98 percent accuracy to become certified."). Audio recording is more reliable than a writing, because one never knows if the signatory actually read what he or she

was signing. By contrast, with an audio recording, one can observe and decide any disputes based on the actual content of what was said during the conversation.

These technological advancements, including the modern insurance business model which utilizes direct writers, create important implications for the statutory construction of A.R.S. § 20-259.01(B). When a consumer buys an insurance product over the phone, "a licensed agent will probably be involved, but a recorded acceptance will be utilized instead of a written application." Michael A. Eubanks & Melissa M. Schwartz, *Practice Tips, Accidental Death Claims: In-House Counsel's Perspective,* 30 BRIEF 62, 62 (Fall 2000). The American Law Institute noted that "written applications or consent requirements could be problematic under many states' insurance laws" in light of the new industry practices of selling insurance products over the telephone, the Internet, or by some fashion whereby a policy is bound and premium dollars are immediately and automatically transferred from a policyholder's bank or securities account, as they were in this case." Cynthia J. Borrelli & Douglas C. Furlong, *Regulation of and Litigation Involving Insurance Agents and Brokers and Their Activities in the Year 2001,* SF81 ALI-ABA 359, 361 (May 10, 2001).

Obviously, times have changed since 1981, when the Arizona legislature added the "written notice" requirement in A.R.S. § 20-259.01(B). That was before insurers were doing significant business on the

Internet, before the passage of the Gramm-Leach-Bliley Act, and before the direct writer business model was nearly as pervasive as it is today. Since then, the legislature has never directly addressed the problems concomitant with the new trend of buying insurance directly over the Internet/telephone and similar issues arising from the direct writer system by modifying the statute directly. The statute is silent as to how the "written notice" requirement should be interpreted in light of the new modes of doing insurance business, such as the Internet, direct phone contact, email, and so forth.[1]

Fortunately, this is not the first time courts have been faced with the task of interpreting insurance statutes in light of post-amendment technological and industry developments. In similar cases where the statute is silent as to its applicability to direct writers, courts have taken a flexible approach that focuses on fulfilling the intent of the legislature rather than rigidly adhering to outdated business models. For example, in ***Wellman v. GEICO General Ins. Co.***, 931 So. 2d 1046 (Fla. App. 2006), GEICO was a "direct" issuer of automobile insurance, selling over the telephone or the Internet. Wellman called GEICO and purchased automobile insurance directly, with no agent involved. Wellman was subsequently involved

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[1] See Section II(C) for a discussion of the Arizona legislature's global modification of all Arizona laws, including A.R.S. § 20-259.01(B), to reflect the digital age and electronic transactions.

in an automobile collision and made a GEICO claim. GEICO immediately sent a written reservation of rights explaining that the policy had been cancelled for non-payment of premium prior to the accident. A Florida statute provided that an insurer's notice of cancellation is not effective "unless mailed or delivered by the insurer to the named insured *and to the named insured's insurance agent*." F.S.A. § 627.728 (emphasis added). The statute, however, is silent regarding cancellation notice to agents where the policy was issued by a direct writer. In ***Wellman***, GEICO did not send notice to an agent, since there was no agent involved. Despite failing to adhere to the letter of the statute, the court held that GEICO's cancellation was valid. The court reasoned that "[a] direct insured gains no benefit by our imposing additional notice obligations on the insurer beyond those exercised here." *Id.* at 1048. *See also* ***Teachers Ins. Co. v. Bollman***, 617 So. 2d 817, 818-19 (Fla. App. 1993) (holding that insured knowingly rejected stacked uninsured motorist coverage where insured, after discussing rates for stacked uninsured motorist coverage with her agent, directed memorandum to agent instructing him to change automobile policies from stacked coverage to unstacked coverage "as discussed last week on the telephone," even though written rejection was not on statutorily prescribed form.)

As set forth in the foregoing cases, courts take a flexible approach because of the new business model involving telephonic and on-line transactions.

Similar's Progressive's offer of UIM coverage to Giant Electric fulfilled the intent of Arizona's UM statute. *See* Section II(D), *infra*. And as will be shown, the electronic recording of the conversation between Progressive and Giant Electric does constitute a "writing" under Arizona law and should be given legal effect.

B. The Electronic Signatures in Global and National Commerce Act Preempts Arizona Law to the Extent that Arizona Law Purports to Invalidate an Offer in Electronic Form.

Congress acted in light of the dramatic changes affecting the various business models, including the business of insurance. Effective October 2000, more than a year before the November 2001 telephone call between Progressive and Giant Electric, Congress passed the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), Pub.L. 106-229, June 30, 2000, 114 Stat. 464. This statute states in relevant part:

> (a) In general
>
> Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –
>
> (1) a signature, contract, *or other record relating to such transaction may not be denied*

legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction *may not be denied legal effect,* validity, or enforceability solely because an electronic signature or *electronic record was used in its formation.*

15 U.S.C. § 7001 (emphasis added).

The statute provides the following definitions:

(2) Electronic

The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

* * *

4) Electronic record

The term "electronic record" means a contract or other record created, generated, sent, communicated, received, *or stored by electronic means.*

15 U.S.C.A. § 7006 (emphasis added).

This broad definition is technology neutral and is intended to encompass a wide range of electronic recordings, including telephonic recordings. Notwithstanding the broad application of E-SIGN. Defendant Palomera-Ruiz contends that the electronic recording of the UM/UIM offer and acceptance made to Giant Electric should not be given legal effect simply

because it is in electronic form, rather than in writing. However, Progressive's electronic recording of the telephone call fits directly within E-SIGN's definition of "Electronic record". [See Exhibit 3 to RSOF for description of electronic recording process]. Thus, pursuant to E-SIGN, the electronically recorded telephone call in which Progressive offered UM/UIM limits between $15,000 and $1 million satisfies the "written notice" requirement of A.R.S. § 20-259.01(B) and must be given legal effect. Contrary to Defendant Palomera-Ruiz's contention, the mere fact that the UM/UIM offer was not made in writing does not mean that it should not be given legal effect. E-SIGN applies notwithstanding any Arizona statute or regulation to the contrary. 15 U.S.C. § 7001(a).

Defendant Palomera-Ruiz mistakenly contends that Progressive's offer was somehow deficient because Progressive did not immediately provide the recorded transcript to Giant Electric at the time of the phone call. [*See* Motion at p 4 lns. 11-13]. But Defendant Palmoera-Ruiz's allegation that a paper transcript is required would frustrate the purpose of E-SIGN, which is "to protect transactions from legal challenges that are solely based on the electronic form of the agreement." ***Prudential Ins. Co. of America v. Prusky***, 413 F.Supp.2d 489, 494 (E.D. Pa. 2005).[2] If an offer of UIM coverage was not valid

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[2] *See also* William F Savino & David S Widenor, *2003-2004 Survey of New York Law. Commercial Law*, 55 Syracuse L Rev 761, 768 & n.23 (2005) ("With the proliferation of electronic

(Continued on following page)

until the insurer sent out a paper transcript of the phone call in which insurance was offered, this would not only pile on unnecessary costs, but it would also eliminate the speed, convenience, and efficiency which are the benefits of direct purchasing over the telephone. That is not what Congress intended. E-SIGN itself provides:

> (c)(3) Effect of failure to obtain electronic consent or confirmation of consent
>
> The legal effectiveness, validity, or enforceability of any contract executed by a consumer *shall not be denied solely because of the failure to obtain* electronic consent or *confirmation of consent by that consumer* in accordance with paragraph (1)(C)(ii).

15 U.S.C.A. § 7001 (emphasis added). Thus, Progressive's alleged failure to confirm the offer by sending the transcript to Giant Electric is irrelevant and does not impair the legal effect of the selection made during the November telephone conversation.

The Supremacy Clause provides that where states and the federal government pass legislation on the same subject matter, the federal law is supreme, and the conflicting state law is rendered void. *See* U.S. CONST. art. VI. Therefore, E-SIGN preempts

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records, the main purpose of these new laws is to encourage electronic commerce by making an electronic 'signature, contract, or other record relating to such transaction[s]' as binding as a hand-made signature.)

A.R.S. § 20-259.01(B) to the extent that the Arizona statute purports to invalidate an offer made or stored in electronic form. It is true that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 to 1015, generally established a form of "inverse preemption", letting state law prevail over general federal rules that do not specifically relate to the business of insurance. ***NAACP v. American Family Mut. Ins. Co.***, 978 F.2d 287, 295 (7th Cir. 1992). However, E-SIGN *does* specifically relate to the business of insurance, providing in relevant part:

> (i) Insurance
>
> It is the specific intent of the Congress that this subchapter and subchapter II of this chapter *apply to the business of insurance.*

15 U.S.C.A. § 7001(i). Congress could not have drafted a clearer expression of its intent to preempt state insurance laws to the extent they conflict with E-SIGN.

Since the passing of E-SIGN, courts and administrative agencies have approved insurers' use of voice recordings as being equivalent to a writing. For example, in 2004, the Office of General Counsel representing the view of the New York State Insurance Department issued an Official Opinion that a life insurance agent may "have an applicant sign a life insurance application by the entry of their social security number into an interactive voice response (IVR) system using a telephone keypad." N.Y. Office of Gen. Counsel Op. No. 04-08-15 (2004). The Opinion

stated that both E-SIGN and New York's Electronic Signature and Records Act support the "use and acceptance of electronic signatures and electronic records in commercial transactions, and confirm their legal validity." *Id.*

C. Under Arizona Law, a Recording Is Equivalent to a Writing.

Consistent with the congressional passage of the Electronic Signatures in Global and National Commerce Act, the Arizona legislature passed the Arizona Electronic Transactions Act ("AETA"), A.R.S. § 44-7001 et seq. AETA provides in relevant part:

> Legal recognition of electronic records, signatures and contracts
>
> A. A record or signature in electronic form cannot be denied legal effect and enforceability solely because the record or signature is in electronic form.
>
> B. A contract formed by an electronic record cannot be denied legal effect and enforceability solely because an electronic record was used in its formation.
>
> C. An electronic record satisfies any law that requires a record to be in writing. A.R.S. § 44-7007.

The legislature stated that AETA should be construed and applied to:

> 1. Facilitate electronic transactions consistent with other applicable law.
>
> 2. Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.
>
> 3. Effectuate its general purpose to make uniform the law of this state with respect to the subject of this chapter for intrastate, interstate and international transactions.

A.R.S. § 44-7006.

Thus, AETA is similar to and consistent with E-SIGN. Rather than modifying each and every statute in Arizona containing an "in writing" or "written" requirement, the Arizona legislature enacted a statute that had global effect on and modified all Arizona laws, including A.R.S. § 20-259.01(B). A.R.S. § 44-7006(1). The Arizona legislature wanted all Arizona laws to reflect the digital age and allow for electronic transactions, including telephonic and internet transactions. AETA provides that "an electronic record satisfies ***any law*** that requires a record to be in writing." A.R.S. § 44-7007(C) (emphasis added). Consequently, the UM/UIM selection form required under Arizona law as evidence that the insured accepted or rejected UM/UIM coverage can be created and stored by electronic means and still satisfies the statute. Accordingly, this Court must give this electronic transaction legal effect.

The analysis here is nearly identical to the one set forth above in regards to E-SIGN. The recorded telephone call between Giant Electric and Progressive is an "Electronic record" under AETA because it was created, generated, sent, communicated, received or stored by electronic means. A.R.S. § 44-7002(7).[3] [See Exhibit 3 to RSOF for description of electronic recording process]. AETA provides that an electronic record satisfies any law that requires a record to be in writing. A.R.S. §44-7007. Hence, the electronically recorded telephone call at issue in this case satisfies A.R.S. § 20-259.01(B).[4]

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[3] "Electronic" means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities. A R S § 44-7002(5) Clearly, the electronically recorded telephone call meets this criteria.

[4] Furthermore, Ariz R. Evid 1001 provides in relevant part:

> (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing. photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation
>
> (3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it

The electronically recorded telephone conversation between Mr. Thompson and Progressive qualifies as a writing within the meaning of the above-quoted provision. Therefore, even in the absence of E-SIGN, under AETA and Ariz. R Evid 1001, Progressive satisfied the requirements of Arizona's UIM statute.

D. The Statute of Frauds Recognizes Tape Recordings as "Writings."

Similar to A.R,S. § 20-259.01(B), Arizona's Statute of Frauds. A.R.S, § 44-101 contains an "in writing" requirement. The statute of frauds requires that certain enumerated agreements or promises be in writing and signed by the party charged. Arizona courts have not addressed whether an electronic recording of a telephonic conversation constitutes a "writing" for the purposes of the statute of frauds. Other jurisdictions have held that a tape recorded conversation satisfies the statute of frauds. See, e.g., ***Londono v. City of Gainesville***, 768 F.2d 1223, 1227 (11th Cir. 1985) ("the tape recording, of the City Commission's action at the meeting satisfies the statute of frauds requirement of a signed writing."); ***Ellis Canning Co. v. Bernstein***, 348 F.Supp. 1212, 1228 (D. Colo. 1972) (holding that tape recorded oral contract satisfied "writing" requirement of statute of frauds); cf., ***People v. Avila***, 770 P.2d 1330 (Colo. Ct. App. 1988) (finding recording on computer disk was a "writing" for purposes for forgery statute); ***Friedman v. Clark***, 248 A.2d 867 (Md. 1969) (testimony recorded in open court will, under appropriate circumstances, take case out of statute of frauds).

Although not directly applicable, Arizona's statute of frauds also lends support for the contention that the electronic recording of the UM/UIM offer satisfies the "writing requirement" of A.R.S. § 20-259.01(B) and should be given legal effect.

IV. CONCLUSION

Based upon the foregoing, Progressive respectfully requests that this Court deny Defendant Palomera-Ruiz's motion for summary judgment. Instead, this Court should enter summary judgment in favor of Progressive, holding that the electronic recording of the UM/UIM selection should be given legal effect and that the policy provides UM/UIM limits of $100,000 per claim and $300,000 in the aggregate.

DATED this 7th day of December, 2007.

KUNZ PLITT HYLAND DEMLONG AND KLEIFIELD, P.C.

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff, vs. GIANT ELECTRIC CORPORATION, an Arizona Corporation; ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; and MANUEL JESUS ARMENTA-AVENA; a single man, Defendants.	No. CV2007-012149 **PLAINTIFF'S RESPONSE IN OPPOSITION TO SEPARATE STATEMENT OF FACTS IN SUPPORT OF DEFENDANT PALOMERA RE MOTION FOR SUMMARY JUDGMENT** **AND** **SEPARATE STATEMENT OF FACTS IN SUPPORT PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 7, 2007)

(Assigned to
Hon. Bethany G. Hicks

(ORAL ARGUMENT REQUESTED)

Pursuant to Rule 56.1 of the Local Rules of Practice of the United States District Court for the District of Arizona, Plaintiff Progressive Casualty Insurance Company "Progressive"), by and through undersigned counsel, hereby submits the following Response to Separate Statement of Facts in Support of Defendant Palomera Re Motion for Summary Judgment (hereinafter "SOF"). This Statement of Facts ("RSOF") is supported by the attached exhibits. Solely for the limited purpose of Plaintiff's motion, these facts are undisputed:

1. Plaintiff objects to Statement of Fact #1 because the Complaint does not indicate that Jose Palomera-Ruiz was an employee of Giant Electric. Upon information and belief, Mr. Palomera was an independent contractor for Giant Electric.

2. Statement of Fact #2 is not disputed for purposes of the motion for summary judgment *only*.

3. Statement of Fact #3 is not disputed for purposes of the motion for summary judgment *only*.

4. Statement of Fact #4 is not disputed for purposes of the motion for summary judgment *only*.

5. Plaintiff objects to Statement of Fact #5 to the extent that it is not the best evidence or proof of ownership of the vehicle in question and simply

states that the vehicle was owned by Giant Electric. Notwithstanding this objection and without waiving it, Statement of Fact #5 is not disputed for purposes of the motion for summary judgment *only*.

6. Plaintiff objects to Statement of Fact #6 because the response to Request for Admission #1 does requests that Progressive admit that it insured a 1979 yellow Ford Utility van. Request #1 simply seeks the admission that at the time of and prior to the September 12, 2006 motor vehicle accident involving Jose Juan Palomera-Ruiz Progressive issued a policy of automobile insurance to Giant Electric that included coverage with $1,000,000 in liability. Plaintiff objected to Request #1 on the grounds that the request is overly broad, unlimited in time and scope, vague and ambiguous. Plaintiff incorporates these objections into this response. Plaintiff admits that it issued a commercial automobile policy for the policy period of November 12, 2001 to November 12, 2002 with combined single liability limits of $1,000,000 to Giant Electric Company. The policy was renewed with a policy period of December 12, 2002 to December 12, 2003 with the same limits. The policy was again renewed with a policy period of January 5, 2004 to January 5, 2005 with the same limits. The policy was again renewed with a policy period of January 5, 2005 to January 5, 2006 with the same limits. The policy was again renewed with a policy period of January 5, 2006 to January 5, 2007 with the same limits. Prior to November 12, 2001, Progressive did not insure Giant Electric. [Respective declarations pages

from 2001 through 2007 are collectively attached hereto as Exhibit 1].

7. Statement of Fact #7 is not disputed for purposes of the motion for summary judgment *only*.

PROGRESSIVE'S SEPARATE STATEMENT OF FACTS

8. On November 12, 2001, Progressive received a telephone call from Christopher W. Thompson, the President/CEO of Giant Electric, applying for insurance with Progressive. [See generally transcript of Nov. 12, 2001 phone call between Mr. Thompson and Progressive representative "Victoria", attached hereto as Exhibit 20.

9. The telephone conversation was electronically recorded. [*See id.* & Declaration of Stacey Koskinen in support of Cross-Motion for Summary Judgment, attached hereto as Exhibit 3].

10. Mr. Thompson requested liability insurance in the amount of $1,000,000. [Exhibit 2 at 8:294-96, 11:424].

11. During the conversation, Mr. Thompson informed Progressive that his previous policy with Hartford Insurance Company of the Midwest had $1,000,000 of uninsured motorist and underinsured motorist (UM/UIM) coverage. [*Id.* at 13:505-509].

12. During the conversation, Mr. Thompson was informed that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. [*Id.* at 12:486-87].

13. During the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. [*Id.* at 18:724-19:790].

14. During the conversation, Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. [*Id.*]

15. In response, Mr. Thompson chose $100,000 of UM/UIM coverage. [*Id.*]

16. Thereafter, Progressive issued a commercial auto policy to Giant Electric for the policy term of January 5, 2001 through January 1, 2002. [*See* Declarations Page attached hereto as Exhibit 1].

17. The policy provided coverage with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. [*Id.*]

18. The policy was renewed for successive years with the same UM/UIM coverage limits. [*See* RSOF #6].

DATED this 7th day of December, 2007.

KUNZ PLITT HYLAND DEMLONG AND KLEIFIELD, P.C.

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[Exhibit 1 Omitted In Printing]

Recorded Interview of:
Chris Thompson
Claim No.: 069251985
Date Of Interview: 11/12/2001

[SP] = Spelling
[SS] = Speaking Simultaneously
[TD]= Tape Damage

[1] Q: Victoria

A: Chris Thompson

Q: [phone ringing] Hello, this is Victoria. How can I help you?

A: Um, just wondered if I can get some truck insurance from you.

Q: OK. What state is this for?

A: Um, Arizona.

Q: And what kind of vehicle are you using?

A: It's, um, a Chevrolet.

Q: A pickup? What, what kinda truck?

A: Uh, it's a 1987, um, it's a work truck.

Q: Is it a pickup?

A: No.

Q: OK. What kinda, what kinda vehicle is this?

A: Um, it's a van.

Q: It's a van. OK. And you said you're using it to tru-, for trucking? What, what do you do for a living?

A: I'm an electrician.

Q: You're an electrician. OK. OK. And you wanna get a quote on just the one van?

A: Well, does it, is it cheaper by the dozen or something or what?

Q: No, we don't all, offer multi-vehicle discounts. How many do you have?

A: Just one

Q: OK. And, um, how many drivers?

[2] A: Um, be one.

Q: Are you just looking for liability coverage or full coverage?

A: Liability coverage.

Q: OK. And, uh, is this your business?

A: It's corporation.

Q: It's a corporation? Is, are you the president?

A: Yeah.

Q: OK. And what's the name of the business?

A: It's Giant Electric Corporation.

Q: Your name?

A: Are you in Phoenix?

Q: Nope, we're in Cleveland.

A: Oh. Wow.

Q: Mm-hmm.

A: Indians did pretty good, huh?

Q: Uh, I don't think they did that great.

A: Well, I don't know.

Q: OK.

A: I'm an old . . .

Q: OK.

A: . . . Indians fan.

[3] Q: Are ya?

A: Yeah.

Q: OK.

A: Um . . .

Q: And what is your name?

A: It's Chris.

Q: With a C or a K?

A: C.

Q: OK. And your last name, Chris?

A: Thompson.

Q: T-H-O-M-P-S-O-N?

A: Yes.

Q: OK. Have you ever had a quote or a policy with our company before?

A: Nope.

Q: OK. How did you hear about Progressive before calling us today?

A: Internet.

Q: OK. Now, what are you hauling in your vehicle?

A: Um . . .

Q: Besides your, your tools.

A: Um, electrical parts.

Q: OK.

[4] A: Um, you know, conduit and wire.

Q: Uh-huh. Are you looking for coverage also on your equipment and tools and stuff like that?

A: No.

Q: Just for your vehicle only?

A: Yeah.

Q: OK. Your telephone number?

A: 623 . . .

Q: Mm-hmn.

A: . . . 847 . . .

Q: Mm-hmm.

A: . . . 3221.

Q: OK. Now, do you currently have insurance right now?

A: Yes.

Q: OK. Well, what's got you shoppin' for insurance, then, today with us?

A: Um, I just, it, this thing gets away from me for, you know, like, years at a time. And I . . .

Q: Uh-huh.

A: . . . I wanted to, uh . . .

Q: Just shop around?

A: Yeah, I just wanted to see where, where insurance was at.

Q: OK. Now, um, I'm sorry, who did you say you're with right now?

[5] A: Hartford.

Q: Parchwood?

A: Um, uh, it's, uh . . .

Q: I've never heard of . . .

A: . . . Hartford.

Q: Oh, Hartford. OK. [laughs] I've heard of them. OK. Uh, now, are you set up under a commercial vehicle policy with them?

A: Yes.

Q: OK. How long have you been incorporated?

A: For, um, about four years.

Q: OK. How much experience do you have as an electrician all together, Chris?

A: About three weeks.

Q: OK. And you already have your own corporation?

A: What's that?

Q: This is your corporation, right? You're the president?

A: Yes.

Q: OK. And you've only had three weeks of experience but it's been incorporated for four years?

A: Well, I've had three weeks experience about a hundred times over. So but I've still got the same, I mean, you wanna know how many years I've been in business? I'm, like . . .

Q: Or how much ex-, experience you have as an electrician. Is it just three weeks?

A: Um, well, um . . .

Q: I guess I'm a little confused. You have a, you have a, you have a, I mean, this corporation [6] is, you're an electrician. You have a corporation already and you've only had three, three weeks of experience?

A: Is that unusual?

Q: Is, is that all, is that all you do?

A: Yes.

Q: Yeah, usually it takes longer just to get the paperwork and the experience. [laughs]

A: Wow. Well, I guess, I guess I've been knockin' around doin' this since, uh, uh, this month, 26th of this month will be, uh, uh, 25 years.

Q: OK. So you've, you've been doing this, OK, why did you say three weeks experience?

A: I guess I misunderstood your question.

Q: OK. So you've been doing this for 25 years? How old are you?

A: 47.

Q: OK. And that's Giant, G-I-A-N-T, Electric, E-L-E-C-T-R-I-C, Corporation, C-O-R-P. OK. And do you have a fax number for your business?

A: 623-847-3218.

Q: Do you have an e-mail address that you use for your business?

A: No.

Q: OK. What's your mailing address?

A: 3208 North 53rd Parkway.

Q: Any unit or apartment number at all?

A: No.

Q: City?

A: It's, um, Phoenix.

[7] Q: And the ZIP Code?

A: 85031.

Q: OK. And where do you, uh, store the van when you're not usin' it?

A: At, uh, 5408 West Myrtle Avenue in Glendale, Arizona.

Q: And the ZIP Code?

A: 85301.

Q: OK. When is your, so you said your, um, your, what is your Hartford policy set to renew? The policy that you have right now? The commercial policy.

A: Uh, right now. Right away.

Q: OK. Like, how, how recently? Is it this month or . . .

A: Yeah.

Q: What day?

A: Well, uh, let's see. The 30th.

Q: OK. Now, actually, the Hartford has several different programs that they offer in this state. They have Hartford Insurance Company of, uh, the Midwest, the Southeast, Underwriters, they have Hartford Underwriters Insurance Company. Do you know which one you're with? Hartford Casualty, Hartford Player Insurance?

A: No . . . [SS] . . .

Q: They're, they're all different. A lot of programs they have.

A: The Hartford Financial Institution Business Center. Is that it?

Q: Um, doesn't, that's OK. I'll just pick one of these. That's fine.

A: The, the top of this policy says The Hartford.

Q: OK.

[8] A: 308 Farmington Avenue, um, Farmington, Connecticut.

Q: OK. Now, what level of liability coverage do you currently carry with the Hartford?

A: Million.

Q: OK. OK. And what is your date of birth?

A: 18th of January.

Q: What year?

A: '54.

Q: OK. Are you gonna be using your vehicle to haul any kind of debris or garbage for a fee?

A: No.

Q: OK. OK. And aside from yourself, your company, is there anybody else that needs to be listed as an additional insured?

A: We will, uh, tell you from time to time who, who that would be.

Q: OK. But for the, right now, nobody else?

A: Well, um . . .

Q: Are you talking about drivers or . . .

A: No, I'm talkin' about other companies.

Q: OK.

A: I've got one here from Jack in the Box.

Q: Is there anybody that you need me to, to quote on at this point in time?

A: Quote on?

Q: Yeah, additional insureds. We do charge for additional insureds $25 each additional insured.

[9] A: You're kiddin' me?

Q: Nope. How many do you ever have at one time? Usually have a lot of 'em?

A: Is it . . .

Q: A lot of 'em?

A: Well, whoever asks for it. You know. We work for many companies who, uh, we're, we're . . .

Q: No, do, do these companies require you to list their companies by name on their policy? On your policy? That's what I'm askin' about. Like, if a company that you have a contract to work for, if they say to you, 'Chris, I want my company to be listed on your policy as an additional insured.' Do they ever say that to you? That's what I'm talking about.

A: Yeah.

Q: OK. So how many do you have?

A: Not sure.

Q: OK.

A: Sittin' here holdin' one in my hand right now. Kinda what jogged my memory, though.

Q: OK.

A: Take a look at this.

Q: OK. When you're taking on a job, how far away do you usually go out to? What's the furthest you'll take on a job?

A: Um, probably, um, 30 miles, probably.

Q: OK. I'm gonna put you in the lowest bracket we have which is 50 mile radius.

A: Yeah, that'll cover the (_____).

Q: Yeah. Yeah. And are you married or single?

[10] A: Single.

Q: OK. Any tickets in the last three years for you, Chris?

A: No.

Q: Any accidents, your fault or not, in the last three years?

A: No.

Q: OK. Now, is this like a cargo van?

A: It's a, um, I, I think that's correct. Is that the, it's, um, by cargo, what, what do we, what do we mean?

Q: Like, a stripped out van with two seats in the front?

A: Yes.

Q: OK, good. OK. And is this your personal vehicle, also, or just for work or both?

A: No, it's just for work.

Q: OK. And when . . .

A: No pers-, no personal use.

Q: OK. And when you are working, what's an average number of different job sites that you go to a day?

A: Um, one.

Q: OK. And you said just liability we're gonna do on this.

A: Yes.

Q: OK. All right. OK. So how, how many additional insureds do you need me to put on here at this point?

A: Well, I've got the one. I don't know.

Q: OK. Just one?

[11] A: We get letters, uh, throughout the year.

Q: OK. So one for now?

A: Yes.

Q: OK. All right. Let me put in the coverages for you. You said a million dollars. Um, do you have your, co-, package in front of you with Hartford?

A: Yeah.

Q: OK. Um, what other coverages do you have listed on there other than the liability?

A: Um, auto medical payments.

Q: Mm-hmm.

A: Uh . . .

Q: How much coverage?

A: It says $5,000 each.

Q: OK. Anything else?

A: Why, why does it say 'insured' in quotation marks?

Q: So, that's coverage for you. For the insured, for you. It does not go out to the other party, it goes to you.

A: OK.

Q: Or whoever's driving the vehicle.

A: Uninsured motorist.

Q: Uh-huh.

A: What is that for?

Q: That's for, um, coverage for yourself or your passengers in your vehicle if you are hit by [12] another party that has no insurance and they're at-fault.

A: OK.

Q: Covers your injuries.

A: Again, that'd be 5,000 each insured.

Q: OK

A: Is that . . .

Q: Um, the lowest amount of coverage we offer is 15,000. That's actually a much higher level of coverage.

A: This, this one doesn't say at all. It says, um . . .

Q: Well, it's not required to carry in the state. If you, if you don't want it, you don't have to have it but it is optional.

A: And then underinsured. Uh, it doesn't really matter. Uh, I'm lookin' here, it's, like, $12 a year and . . .

Q: It, are you read . . .

A: . . . it's $13 a year for each of this uninsured and underinsured motorist.

Q: Well, what level of coverage are they covering you at? 'Cuz you can go from 15,000 to a million. There's a lot of different levels to choose from and we . . .

A: It is in a column with $5,000 at the top. Must, must, they must mean, uh, they must mean 5,000 per, uh . . .

Q: OK. There's no, there's no such thing as a $5,000 level for uninsured motorist. Actually the smallest is 15,000. Those are the minimums for the state of Arizona.

A: Well . . .

Q: Are they charging, does, does it say 'uninsured and underinsured motorist coverage for bodily injury?'

A: Well, wait a minute. Wait just a second. Wait just a second. Get another, here's another [13] page . . .

Q: Mm-hmm.

A: . . . that says, uh, uninsured motorist one mill-, per accident one million dollars.

Q: There you go. There you go. OK.

A: Underinsured motorist per accident one million dollars.

Q: OK. OK. And that should be it, right? There's no other coverages?

A: He . . .

Q: That's probably it. 'Cuz you're not getting, um, you're not getting full coverage on the vehicle. So there should be no comprehensive or collision.

A: No.

Q: OK.

A: No, there's no other, uh . . .

Q: Gotcha.

A: . . . no other coverages.

Q: Gotcha. OK. One year 1,399. What are you, uh, being charged with the Hartford Insurance?

A: Um, bear with me just a second.

Q: Sure, no problem.

A: I have one more driver I wanna put on here.

Q: Sure.

A: Um, do you want his name or just want . . .

Q: Sure, that'd be great. Whatever you have.

[14] A: It's, um . . .

Q: Uh, name, date of birth.

A: Um, Salvador Clemente.

Q: Uh-huh.

A: Um . . .

Q: And do you have an age or date of birth?

A: He's the same age as I am. I don't, I don't remember his birthday. 47.

Q: OK. Same age, though? OK.

A: I've got his driver's license number but I don't have his . . .

Q: That's OK. Is, do you know if Salvador is married or single?

A: He's married.

Q: OK. Uh, as far as you know, Chris, any tickets for Salvador in the last three years?

A: I think he has a clean record.

Q: OK. No accidents his fault or not? Good.

A: No, I, I think his, he has a very clean record.

Q: OK. OK. Yep, 1,399.

A: And [pause] hold on a second. [pause] I believe that's a better rate.

Q: OK. Good.

A: The, I think I have to add these up. It's really close.

Q: OK.

A: 1,224 for liability.

[15] Q: OK. So your . . .

A: 93 . . .

Q: Oh.

A: . . . for, uh, medical.

Q: OK.

A: Um, 18, 18 for uninsured. And 91, wait, that's for underinsured.

Q: OK.

A: Which is 1,426.

Q: OK. So we're at 1,399. And are you on a payment plan?

A: Yeah.

Q: OK. I was gonna say, the only way I can make this a little bit cheaper is if you pay it off in one

shot and I can d it for 1,348. Otherwise on a payment plan, it's 1,399.

A: Well, um, but the 1,399 includes the, uh . . .

Q: Yep.

A: . . . finance charge?

Q: Well, yeah, the 1,399 is it, yeah, it is the, that's how much the rate is. OK? The, however, depending on how many payments it takes you to pay off the plan . . .

A: Yeah.

Q: . . . we do charge an installment fee of $10 on each additional payment after the down payment. So, like for example . . .

A: How much is the down payment on that?

Q: Well, we offer, like, for example, ten payments is the most we offer but there's a down payment of 368.50 to start. And then there'd be, oh, I'm sorry, we also have 11 pay, too, if that's a little bit easier, too, for ya.

[16] A: What did you call it?

Q: Uh, we have a ten and we also have an 11 pay. Ten or 11 payments for the year.

A: OK.

Q: The, the shortest down, uh, smallest down payment would be the 11 payments. It's 299.80 to

start. And then the last ten payments are $119.92 but those last ten payments already include a $10 installment fee. So technically you're paying a hundred dollars more just because of the installment fees if you go on this particular plan. So it's like . . .

A: So if I give you . . .

Q: . . . so it's like 1,499, basically.

A: Oh, I see.

Q: With the installment fees. If you, if you do less payments, uh, and then it's less, you know, obviously, less installment fees you pay. So if you're at 1,426 . . .

A: You could, you could get it down to what?

Q: Uh, well, it depends on what you can afford to pay. We do ten payments, we do seven payments, we do three and we do one.

A: What, what is one payment?

Q: Uh, well, it's a paid-in-full rate and I can discount it down to 1,348. [pause] Is your 1,426 with the financing, too?

A: I don't think so.

Q: Oh, OK. All right. I was gonna say, you might be doing better then if you're lookin' for a payment plan.

A: No, this is just the, in the . . .

Q: Just . . .

A: . . . this is, like, what you said, the individual coverages.

[17] Q: Gotcha. Gotcha.

A: But then the financing is on top of that.

Q: Gotcha. OK.

A: Well . . .

Q: What kind of a payment plan seems comfortable for you?

A: I, I, I . . .

Q: That you could handle?

A: I could, I could pay this all at once, as far as that goes.

Q: OK. Well, that would be your best bet as far as savings for you versus going on, like, a ten or 11 payment. You'll save well over a hundred dollars, a $150 right there a year.

A: Um, the auto, the auto medical payments . . .

Q: Mm-hmm.

A: . . . are for the driver or the passengers of the car?

Q: Both. Both. Well, uh, I'm sorry, when I say 'pass-,' it's your passengers not anybody, this coverage

is all for you and the people in your vehicle and it pays out per accident.

A: It looks like, is that $5,000?

Q: Yes.

A: Per accident?

Q: Per accident.

A: And it costs $93?

Q: Yeah, ours costs $39. That . . .

A: Well . . .

[18] Q: . . . that actually is, yeah, that's the highest level that you can get, too, that we offer is 5,000.

A: That's the highest level?

Q: That we even offer. Yeah, 5,000.

A: And it, and it's 39 bucks?

Q: That's what we offer. Yeah, that's what we charge.

A: OK. Well, that's good. And then, uh . . .

Q: Now, one thing you may wanna, it's up, this is up to you. The uninsured and the underinsured motorist coverage where you said a million dollars.

A: Yeah.

Q: Technically it's up to you. Those coverages don't have to be at a million.

A: Yeah.

Q: Your liability's at a million already but if you want less coverage on your underinsured . . .

A: That, that's kinda driven by our vendors. They . . .

Q: Oh, oh. They req-, OK, I'm sorry. So they require that amount?

A: Well, not on the, uh, I don't think they require us to have on it, this other insurance at all.

Q: It . . .

A: It's the liability insurance they don't . . .

Q: OK. Then, then the uninsured motorist really is coverage for yourself and if you have any passengers with you. I can't, I've never heard of an employer or someone you'd have a contract to do work for requiring you to carry that level of coverage for your uninsured. Um . . .

A: Yeah.

[19] Q: Usually the, they just care about the liability.

A: Right.

Q: That's usually what their concern is. But, um, I can get your rate down a little bit if you wanna reduce the coverage on the uninsured.

A: Well, I think that'd be worth lookin' at. Yeah.

Q: OK. Um . . .

A: This underinsured.

Q: It's up to you. Let's see, if I go down to let's say half that, 500,000 paid in full I can bring it down to 1,278. If you wanna go down even more it'll come down even more. I can go . . .

A: Take it down, OK.

Q: . . . for example, uh, I don't know if you wanna go, let's say 100,000,

A: Yeah.

Q: Um, I can bring this down to 1,177.

A: So good, that'll be great.

Q: Is that OK?

A: Yep.

Q: OK. And that, I'm sorry, that 1,177 was still paid-in-full.

A: Yes, that's fine.

Q: OK. OK. All right.

A: Let's do it.

Q: Is there, is there anything else you also want me to look at? You're OK with everything else, then?

[20] A: Yeah, I, I don't know. I . . .

Q: OK. 'Cuz you really can't . . .

A: It's not my . . .

Q: . . . cut the liability. They want the million dollars. You really can't touch that amount.

A: No, I have to . . .

Q: Yeah.

A: . . . I have to leave that on there and then, uh . . .

Q: OK. OK.

A: Does that include the one $25 . . .

Q: Yes, additional . . .

A: . . . additional insured?

Q: It did. The only thing I would need from you, though, um, Chris, would be I would need the name and address of who that additional insured is.

A: OK. It's, um, it's Jack in the Box.

Q: Oh, that's right. You did say that.

A: It's Incorporated.

Q: OK.

A: And the address is 4239 South 43rd Place, Phoenix, Arizona, 85040.

Q: OK. And then from you, well, as well as Salvador, I need both of your license numbers.

A: Yeah. Um . . .

Q: And they're both Arizona licenses?

A: Yes.

[21] Q: OK.

A: Um . . .

Q: You wanna do yours first?

A: Sure.

Q: OK.

A: It's, uh, B as in Boy, 106 . . .

Q: OK.

A: . . . 95549.

Q: Now, on your license, is it Chris or Christopher?

A: Um, uh, it's Christopher.

Q: OK. And Salvador's, can I have his license number?

A: B as in Boy . . .

Q: Yep.

A: . . . 133 . . .

Q: OK.

A: . . . 24341.

Q: OK. And do you have the serial number for the van?

A: Yeah.

Q: The VIN number.

A: Yeah, it's, um, 1 . . .

Q: Yep.

[22] A: . . . G . . .

Q: Yep.

A: . . . D . . .

Q: I'm sorry, D like David?

A: Yes.

Q: OK.

A: H . . .

Q: Mm-hmm.

A: . . . P32P . . .

Q: OK.

A: . . . 2H3501906.

Q: OK. I'm just gonna run the VIN number and both of your driver's license numbers for your motor vehicle reports.

A: OK.

Q: Get all that stuff out of the way. And we'll be all set.

A: OK.

Q: All righty. This . . . [pause] OK. And it's comin' up, uh, as a forward-control P3500 GMC.

A: It . . .

Q: Not a Chevy. What, what is, what, what kind of vehicle is this? It's comin' up as an '87 GMC forward-control P3500.

A: Um, none of those terms mean anything to me but it's a, uh . . .

[23] Q: Is it made by GMC or is it Chevy?

A: It's a, uh . . .

Q: Do we have the right VIN number?

A: Yes.

Q: OK. What kind of vehicle is this?

A: Um, gonna change that. That's based on the VIN number it's a GMC?

Q: It's comin' up as a 1987 GMC.

A: What do you call it?

Q: GMC.

A: It's a . . .

Q: General Motors Corpor- . . .

A: . . . it's an '87 model.

Q: Oh, yeah, yeah, it's comin' up as '87. Yeah. Right.

A: Um, it's, um . . .

Q: It's not comin' up as a van, though. Has it been modified? What, what is, what, what does this vehicle look like?

A: It's a, well, you know what a UPS truck looks like?

Q: Yeah. Is it a step van?

A: Yeah.

Q: OK. OK. [pause]

A: I just thought it was a Chevrolet.

Q: OK.

[24] A: Uh, there's no difference mechanically. You buy the same . . .

Q: OK.

A: . . . the same motors and the same parts.

Q: Well, the difference is it'll make the, the rate change for ya.

A: It will?

Q: [laughs] Yeah, actually, it does. Um, we could, I'm gonna go in, 'cuz we go by gross vehicle weight.

A: Yeah?

Q: Yeah. Um, so it's a, it rate a, we rate a little bit differently here. OK. All right. Same coverages that we went over, a million dollar liability, 100,000 for uninsured and underinsured motorist coverage and 5,000 medical, Um, with the additional insured of $25, you're looking at i-, if you pay it in full, $1,028. So that works out even better for ya.

A: Well, yeah.

Q: OK.

A: Yeah.

Q: All right. Well, let's see if we can get this rate any lower. [laughs] Let me just verify your, uh, clean driving record and I should be done. [pause] OK. Looks like there's a speeding ticket that's comin' up in February 2nd of last year. And it says location Mar-, Maricopa. Then there was also another speeding ticket in August of last year, August 26th, Maricopa. Let's see what else there is. That's it.

A: There was a single speeding ticket in Maricopa. And it's been quite a long time ago. Um, and by that, I don't mean, like, a year. It's been, like, uh . . .

Q: Couple years?

A: Um, well, it was, like, in '97 or something.

Q: Yeah, but we don't, we don't go back that far.

[25] A: Oh . . .

Q: Yeah, I'm not even lookin' at anything beyond nine, uh, three years.

A: OK.

Q: Yeah. Yeah, I'm definitely showing, uh, two speed tickets here. Two different days. One in February of 2000, one, one August 26th, 2000. That's what I'm showin'.

A: Um, well, hang on a second. Um, August 26th a year ago.

Q: And was your license suspended as well?

A: No. My license is fine.

Q: I see that there was a suspension that happened October 15th, last month.

A: Last month?

Q: From a, did you receive something in the mail about your license being canceled? Not canceled but suspended?

A: No.

Q: OK. Uh, it's comin' up on your motor vehicle report. It says, uh, action suspension. It says, uh, effective to April 15th, 2002, notification status says mailed September 25th, 2001. I don't know what that is. You might wanna check with the Department of Motor Vehicles to see what the status of your license is.

A: OK.

Q: Um, I, I don't know what this means. It just says, it's not, like, it's a violation or anything. It just says, it's coming up suspension October 15th. Possibly, um, I don't know, uh, are you paid up on all your fines and everything?

A: You bet.

Q: With the DMV?

A: Yeah.

Q: OK. I, I don't know what that would be, then. I don't know. I would, I would find out just [26] to make sure there's no problems. But then . . .

A: Can we exclude me from the policy?

Q: As a driver?

A: The corporation.

Q: Well, whose name do you want this to be in, then?

A: Well . . .

Q: I can't exclude the corporation. I can, I can leave you off as a driver.

A: What, what name did you put the, the . . .

Q: I put this under, um, Giant Electric Corporation.

A: Yeah. Yeah, that's, that's the way it should be.

Q: Yeah, OK. I can leave you off as a driver.

A: And leave (_____) as the driver?

Q: And just put Salvador as the driver?

A: Yeah, it's his truck to drive, anyway. That's why I made sure to put him on it.

Q: OK.

A: Can just exclude me . . .

Q: OK.

A: . . . as a driver. That's fine.

Q: OK. And you do understand if you're ever driving the vehicle and get caught, or have an accident, there is, absolutely is no coverage for it.

A: Yeah.

Q: You understand that? OK.

[27] A: Yep.

Q: All right. All right, let me go ahead and verify Salvador's, uh, license. [pause] OK. Um, doesn't look like I won't, like I will be able to run his motor vehicle report without his date of birth. You don't have his date of birth at all, do you?

A: Yeah, yeah, I can look it up.

Q: Oh, you do?

A: Yeah, I can look it up.

Q: That'll help me.

A: I just, it's just . . .

Q: Sometimes I can do 'em with just a license number but actually Arizona requires a date of birth, too.

A: Hang on a second. [pause] OK.

Q: Mm-hmm.

A: A little, a little bit more. Hang on just a second.

Q: Sure.

A: [pause] One more minute.

Q: Sure.

A: [pause] Nope, sorry. [pause] Man, this is embarrassing. I, I, it only just went by, his birthday. He just turned 47. It's been, like, the last month or September, October. . . . [SS] . . .

Q: Do you have his phone number that we can call him?

A: Yeah, I've been, I've been doin' that.

Q: Oh, oh, that's what you've been doing? Oh, OK. Mm-hmm.

[28] A: Yeah. Yep. Um . . .

Q: The only other thing we could do is we can, I can just leave the date of birth, I'll just put January

1st for now and then, uh, you'll have to update us on that information so we can run his motor vehicle report.

A: Yeah, I can do that as . . .

Q: That's fine.

A: . . . early as, like . . .

Q: That's fine.

A: . . . right away.

Q: No problem.

A: In the morning or something.

Q: No problem. Yeah, I'll just put, right now I'll just put, so we, I won't run his motor vehicle report yet. Uh, but just so you understand, if there is something on there that shows up, it could affect the rate but we'll let you know if it does.

A: OK.

Q: Um, OK. And the Hartford policy that you have currently, do you have available the policy number on there that you're currently on? The one that's going to come, come due at the end of the month.

A: Yes.

Q: OK.

A: It's, um, it's 48 . . .

Q: Uh-huh.

A: . . . U-G-G . . .

Q: U as in Umbrella, George, George?

[29] A: Yes.

Q: OK.

A: FW9336.

Q: F as in Frank, W as in Wendy, 9336?

A: Yep.

Q: Good. OK. And is that a year policy?

A: Yes.

Q: OK. So it's November 30th to November 30th?

A: Yes.

Q: OK. Um, did you want to start this policy, then, on the 30th? Are you paid up till then, anyway?

A: No, I'm, I'm ready to start it right now. I've got to get some of this stuff under, off of my plate and get back to what I do for a living.

Q: OK. Now, OK. Now, but that is a commercial policy and it's in the name of the corporation?

A: Yes.

Q: OK. Um, do you ha-, OK, 'cuz what we're gonna need to do is see 12 months of continuous

insurance with the Hartford in the company's name. We need to have proof of that faxed over to us.

A: OK.

Q: Um, but we can't have just that policy because technically if you're s-, if you wanna start now, that's not a problem, we can do it. But then we need to see 12 continuous months of insurance.

A: OK.

Q: So we'll need to see the previous policy as well.

[30] A: OK.

Q: 'Cuz we're actually a few days short. Um, let me give you the fax number, though and let me know when you're ready.

A: OK.

Q: OK. Um, it's 1-800-556 . . .

A: Mm-hmm.

Q: . . . 0014.

A: OK.

Q: OK. And it's gotta show insurance from November, oh, what are we today? What are we today? November 12th of last year to November 12th of today. Gotta show us coverage through that time period. OK?

A: So, like, the, the insurance card is good enough?

Q: No, uh, unfortunately, the insurance card is not good enough. We need to see, um, the company name on the policy, we need to see the coverages listed, the, the million dollar level of coverage.

A: OK.

Q: Um, yeah, but we need to have that faxed over. If for some reason you can't get that to us, it could, um, not qualify you for the program that I put you in.

A: [makes noise]

Q: So make sure you do get that to us. Um, and I will give you a, a new Progessive policy number to attach to that fax so we can reference it once it comes in.

A: OK.

Q: Um, did you wanna make a payment with a check or a credit card . . .

A: Here . . .

[31] Q: . . . or debit card?

A: Check is fine.

Q: Check? OK. So we're gonna do the one payment in full, $1,028 even. OK. And you're OK with all the coverages?

A: Yeah, seems fine.

Q: OK. Wonderful. The, the vehicle is paid off, right?

A: Yeah.

Q: There's no loan, nothin', OK. All right. [pause] OK. And what's the check number that you wanna use today?

A: Uh, 11760.

Q: 11760?

A: Yes.

Q: OK. And how does the name appear on the checking account?

A: Giant Electric Corporation.

Q: OK. OK. And if you look at the bottom of that check, Chris, uh, going from left to right, I need you to read every single number that you see.

A: 011 . . .

Q: Uh-huh.

A: . . . 760 . . .

Q: OK.

A: . . . 122101706 . . .

Q: OK.

A: . . . 000235489199.

[31] Q: Great. I'm just gonna read that back to you, uh, starting off with your check number 011760. Then it lists your routing number which is nine digits, 122101706. And then finally your account number 000235489199.

A: Yep.

Q: Good. OK. The system's gonna make me enter this two times just so that I don't transpose any numbers. Takes just a moment. [pause] OK. And go, go ahead and void that check out so you don't use it again.

A: OK.

Q: And make sure that you deduct under that check number 1,028, 1,028 even. No change.

A: OK.

Q: And I have the policy number here for you whenever you're ready, let me know.

A: Ready.

Q: OK. Policy number 045167690. And then I have a confirmation number for you.

A: OK.

Q: OK. It's 0 and then it's four ones, 1111 . . .

A: OK.

Q: . . . then it's 205732.

A: What does that confirm?

Q: That's a confirmation number for the check. Once the check clears.

A: Oh.

Q: That we took your payment by check.

A: OK.

Q: The policy is effect, you wanted this effective today, right? Immediately, right?

[33] A: Yeah.

Q: OK. The 12th of November, 2001, is when this is effective. Um, the time that I have here is 8:55 p.m. And we're in the East Coast here, so we're Eastern Standard Time zone but it's still effective immediately your time. OK?

A: That's, that's fine. We don't have a . . .

Q: Yeah.

A: . . . we don't have a claim working or anything. So . . .

Q: [laughs] OK. And, um, I do, I just need to give you two emergency phone numbers.

A: OK.

Q: Um, the first number, actually, this is the number that's pretty important. This is the number that you call, um, tomorrow or whenever, if you can call us in the next couple days, that would be great,

uh, to update us with, uh, Salvador's, uh, date of birth.

A: Yep.

Q: Uh, this is the number to do it. And also to make any kinda change you want to your policy. It's 1-800-444-4487.

A: OK.

Q: And then the last number is your claims number if you do happen to have a claim. It's 1-800-274-4499.

A: OK.

Q: OK? Uh, so you're all set to go. Everything that you and I went over, I'm gonna send it to you in writing.

A: OK.

Q: And I'm gonna go ahead and send it to you at the 3208 North 53rd Parkway address in Phoenix, Arizona.

A: That's correct. Uh-huh.

[34] Q: Uh, 85031. And I'm showing the phone number 623-847-3221. When you get it, um, Chris, just go ahead and sign it where it asks for your signature, send it back to us as soon as possible. Obviously, don't send us, uh, any money since you're all paid up for the entire year.

A: How much of this policy do I take apart and send to you?

Q: Um, should be, like, the first page. The policy that has the, um, the dates on there, the coverage, coverages showing the million dollar level of liability. It, it's usually one page but if it takes a couple pages to show it all to us . . .

A: OK.

Q: . . . you can send that, too, fax it over. Uh, but make sure you attach the new Progressive policy number on that fax. That way we know what it goes to once it comes in.

A: Attach the, uh . . .

Q: The Pro- . . .

A: . . . new Progressive?

Q: Yeah. Just put the Progre-, new Progressive policy number on the fax as well.

A: OK.

Q: That way we'll, 'cuz actually I personally won't be getting it. A different department will but we'll be needing, they wanna know what it goes to so that's why we just have you put the new policy number on there.

A: OK.

Q: And that's it. So, uh, you're all set to go, OK?

A: All right.

Q: Yeah, just make sure you call, call us with Salvador's, uh, date of birth.

A: OK.

Q: OK?

[35] A: Thank you.

Q: OK. You're all set. Bye-bye.

A: Bye.

EXHIBIT 3

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff, vs. GIANT ELECTRIC CORPORATION, an Arizona Corporation; ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; and MANUEL JESUS ARMENTA-AVENA; a single man, Defendants.	No. CV2007-012149 **DECLARATION OF STACEY KOSKINEN** (Assigned to Hon. Bethany G. Hicks)

I, Stacey Koskinen, declare:

1. I give this Declaration upon my own personal knowledge and experience.

2. I am an Applications Platforms Engineer at Progressive Casual Insurance Company ("Progressive").

3. In that capacity, I am the lead engineer responsible for the design and functionality of the call recording platform for Progressive.

4. Progressive maintains a call recording platform supplied by NICE Systems Inc., that within the company is referred to as the NICE System.

5. The NICE system is an expansive recording system that records all inbound 800 calls into Progressive (except administrative 800 calls) and select outbound calls.

6. The Call Logging System of NICE records over 1.2 million calls a week from Progressive's Personal Lines, Commercial Auto, and Claims Loss Reporting Unit departments.

7. When a customer calls a Progressive 800 number, the telephone call is routed to a call center.

8. The NICE system is sent telephone call data from Progressive's call routing system, which triggers a call record that captures meta-data about that particular call.

9. The system's call logging devices begin to record audio as soon as they hear sound on the phone circuits associated with the system.

10. The telephone call is then delivered to a customer service representative.

11. The information for each call record includes, among other items, the telephone number the customer dialed from, the telephone number called, the date and time of the call as well as the policy number entered by the customer.

12. The customer service representative inputs the customer's name, the name of the agent, and when an insurance quote was provided in Progressive's quoting system. This information is not stored as part of the call record but can be used to locate call recordings.

13. When the telephone call is completed, the system is sent a message to close the call record and the call audio is stored on the call recording device's hard drive.

14. After a period of time, all new call recordings are archived onto an AIT-2 tape.

15. The AIT-2 tapes are maintained for a period of ten (10) years.

16. The call record can be retrieved based upon various identifying information inputted into the system.

17. However, the call record cannot be altered or edited.

18. Once retrieved, the call record can be burned to a CD ("compact disk") for review.

19. The electronic call record for Claim # 069251985 and Policy # 04516769 was retrieved for purposes of this litigation and burned to a CD.

20. The call record is of a telephone conversation on November 12, 2001 with Victoria, a customer service representative of Progressive, and Chris Thompson of Giant Electric Corporation.

21. A true and correct copy of the call record is attached to this Declaration in CD format.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on December 7, 2006, at Cleveland, Ohio.

By: /s/ Stacey A. Koskinen
Stacey Koskinen

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff, vs. GIANT ELECTRIC CORPORATION, an Arizona Corporation; ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; and MANUEL JESUS ARMENTA-AVENA; a single man, Defendants.	No. CV2007-012149 **PROGRESSIVE CASUALTY INSURANCE COMPANY'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** (Filed Feb. 12, 2008) (Assigned to Hon. Janet Barton (Oral Argument Requested)

Progressive Casualty Insurance Company ("Progressive"), through undersigned counsel, and pursuant to Ariz. R. Civ. P. 56, hereby submits its Reply in Support of its Cross-Motion for Summary Judgment. This Reply is supported by the attached Memorandum of Points and Authorities, Progressive's Cross-Motion for Summary Judgment ("Cross-MSJ"), Progressive's Response to Defendant Palomera-Ruiz's Motion for Summary Judgment, and Progressive's Response to Defendant's Statement of Facts/Separate Statement of Facts ("RSOF").

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Palomera-Ruiz *does not dispute* the following facts:

- During the November 12, 2001 telephone conversation, Christopher W. Thompson, the President/CEO of Giant Electric, informed Progressive that his previous policy with Hartford Insurance Company of the Midwest had $1,000,000 of uninsured motorist and underinsured motorist (UM/UIM) coverage. [RSOF ¶ 11].

- During the conversation, Mr. Thompson was informed that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. [RSOF ¶ 12].

- During the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. [RSOF ¶ 13].
- During the conversation, Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. [RSOF ¶ 14].
- In response, Mr. Thompson chose $100,000 of UM/UIM coverage. [RSOF ¶ 15].
- The policy was renewed for ***six*** successive years with the same UM/UIM coverage limits. [RSOF ¶ 18].
- The recorded telephone conversation is an accurate recordation of what happened. [RSOF ¶ 9].

Rather than contest the accuracy or substance of the recorded telephone conversation, Defendant's challenge is based solely on the electronic form of the UM/UIM offer. As discussed below, this type of challenge is invalid as a matter of law.

II. ARGUMENT

A. Defendant's Challenge to the Electronic Form of Progressive's Offer of UIM Coverage Violates the Letter and Intent of Federal and State Statutes Designed to Validate Electronic Transactions.

Both the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), 15 U.S.C. § 7001

et seq., and the Arizona Electronic Transactions Act ("AETA"), A.R.S. § 44-7001 *et seq.*, are designed to validate transactions that are conducted electronically. Defendant's challenge to Progressive's offer of UM/UIM coverage is based *solely* on the electronic form of the offer. Such an argument is directly contrary to both the letter and the intent of E-SIGN and AETA.

As discussed in Progressive's Cross-MSJ, since the Arizona legislature added the written offer requirement to Arizona's UM/UIM statute[1] in 1981, the world has undergone a digital revolution in which technological advancements have spread to every aspect of life, including credit card companies, banks, utilities, insurance companies, and the courts, to name a few. Increased trustworthiness and reliability are major benefits of this technological shift. Here, for example, no one disputes the accuracy of the recorded phone call.

Recognizing the importance of ensuring confidence in the validity of electronic transactions, Congress and the Arizona legislature passed E-SIGN and AETA, respectively. In so doing, Congress sought to facilitate the use of electronic records and signatures in e-commerce. 145 Cong. Rec. S14,881 (daily ed. Nov. 19, 1999) (Congressional finding that the growth of e-commerce in the private sector is in the national interest); *id.* at S14,882 (statement of Sen. Lott that

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[1] *See* A.R.S. § 20-259.01(B).

e-commerce "is a significant driving force behind our nation's robust and expanding economy.").

Similarly, the Arizona legislature stated that AETA should be construed and applied to:

> 1. Facilitate electronic transactions consistent with other applicable law.
>
> 2. Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.
>
> 3. Effectuate its general purpose to make uniform the law of this state with respect to the subject of this chapter for intrastate, interstate and international transactions.

A.R.S. § 44-7006. Commentators have explained that electronic records are the equivalent of paper records:

> [The Uniform Electronic Transactions Act, or "UETA", the model act upon which AETA is based,] accomplishes this goal by making electronic records . . . equivalent to paper records. In short, UETA allows parties to focus on the message they are trying to convey rather than on the medium in which it is presented.

David E. Ewan, John A. Richards, & Margo H. K. Tank, *It's the Message, Not the Medium! Electronic Record and Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments,* 60 BUS. LAW. 1487, 1491 (2005). Thus, Defendant's attack on the electronic form of Progressive's offer is directly contrary

to the purposes of E-SIGN and AETA. Furthermore, the statutory language itself precludes Defendant's argument that the offer is invalid because it was made and stored in electronic form. E-SIGN states in relevant part:

> (a) In general
>
> Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –
>
> (1) a signature, contract, *or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form*; and
>
> (2) a contract relating to such transaction *may not be denied legal effect,* validity, or enforceability solely because an electronic signature or *electronic record was used in its formation.*

15 U.S.C. § 7001 (emphasis added). Likewise, AETA provides in relevant part:

> Legal recognition of electronic records, signatures and contracts
>
> A. A record or signature in electronic form *cannot be denied legal effect and enforceability solely because the record or signature is in electronic form.*

> B. A contract formed by an electronic record *cannot be denied legal effect and enforceability* solely because an electronic record was used in its formation.
>
> C. An electronic record *satisfies any law that requires a record to be in writing.*

A.R.S. § 44-7007 (emphasis added).

Defendant contests the validity of Progressive's UIM offer solely because the offer was in electronic form – precisely the type of challenge forbidden by E-SIGN and AETA. Therefore, Defendant's argument fails and Progressive is entitled to summary judgment in its favor.

B. The UIM Statute's Written Offer Requirement Is Preempted to the Extent that It Purports to Invalidate an Electronic Offer.

Both E-SIGN and AETA preempt the Arizona UM/UIM statute to the extent that the UM/UIM statute purports to require an offer of UM/UIM coverage in paper form. As discussed in Progressive's Cross-MSJ, E-SIGN specifically relates to the business of insurance, providing in relevant part:

> (i) Insurance
>
> It is the specific intent of the Congress that this subchapter and subchapter II of this chapter *apply to the business of insurance.*

15 U.S.C. § 7001(i) (emphasis added).

Therefore, "inverse preemption" under the McCarran-Ferguson Act does *not* apply. Section 2 of the McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . *unless such Act specifically relates to the business of insurance.*

15 U.S.C. § 1012(b) (emphasis added). Construing 15 U.S.C. § 7001(i) and 15 U.S.C. § 1012(b) together, it is clear that E-SIGN preempts A.R.S. § 20-259.01(B) to the extent that A.R.S. § 20-259.01(B) purports to invalidate an electronic offer of UM/UIM coverage.

Defendant's discussion of ***NAACP v. American Family Mutual Ins. Co.***, 978 F.2d 287 (7th Cir. 1992), is merely an attempt to divert attention from the clear language of E-SIGN quoted above. Of course, ***NAACP*** was not a UM/UIM case and did not involve electronic recording, but this circumstance is unavailing to Defendant. In ***NAACP***, the Seventh Circuit held in relevant part that the McCarran-Ferguson Act did not preclude application of the federal Fair Housing Act ("FHA") to allegations of racially discriminatory insurance redlining. ***NAACP***, 978 F.2d at 295. The Court reasoned that the FHA applied because it did not "invalidate, impair or supercede" any Wisconsin state law regulating the business of insurance. ***Id.*** Rather, the FHA merely *duplicated* Wisconsin statutes which prohibited discrimination by insurers. ***Id.***

Unlike the FHA, E-SIGN specifically *does* apply to the business of insurance. *See* 15 U.S.C. § 7001(i). Therefore, the Court need not engage in the additional analysis which the ***NAACP*** court conducted to give effect to E-SIGN. Congress has mandated that E-SIGN applies, even where it "invalidate[s], impair[s] or supercede[s] state laws regulating the business of insurance. Likewise, AETA invalidates A.R.S. § 20-259.01(B) to the extent that A.R.S. § 20-259.01(B) purports to require an offer of UM/UIM coverage in paper form. The Prefatory Notes to the model UETA act lend support for the proposition that the electronic offer made to Giant Electric should be given effect:

> The need for certainty as to the scope and applicability of this Act is critical, and makes any sort of a broad, general exception based on notions of inconsistency with existing writing and signature requirements unwise at best. The uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws is unacceptable if electronic transactions are to be facilitated.

UETA Prefatory Note (A).

Rather than modifying each and every statute in Arizona containing an "in writing" or "written" requirement, the Arizona legislature enacted AETA in order to achieve a global effect on and modify all Arizona laws, including A.R.S. § 20-259.01(B). *See* A.R.S. § 44-7006(3) (stating that AETA should be

construed and applied to "make uniform the law of this state"); A.R.S. § 44-7007(C) (providing that "an electronic record satisfies *any law* that requires a record to be in writing.") (emphasis added). Consequently, the UM/UIM written offer requirement under Arizona law can be made and stored by electronic means because it still satisfies the statute's requirement of evidence that the insured accepted or rejected UM/UIM coverage.

Importantly, the legislature could have exempted Arizona's UM/UIM statute from the scope of AETA, but it chose not to. Section 3 of the model UETA lists three (3) specific areas of law which are exempt from its scope, and also allows States that adopt the model act to exempt other laws as well:

> (b) This [Act] does not apply to a transaction to the extent it is governed by:
>
> (1) a law governing the creation and execution of wills, codicils, or testamentary trusts;
>
> (2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];
>
> (3) [the Uniform Computer Information Transactions Act]; and
>
> **(4) [other laws, if any, identified by State].**

UETA § 3 (scope) (emphasis added). However, the Arizona legislature enacted only the first two (2) exceptions and declined to create new exceptions,

including declining to adopt a specific exception for the UM/UIM statute. The Arizona version of the subsection quoted above states:

> B. This chapter does not apply to a transaction to the extent the transaction is governed by:
>
> 1. Title 14 as it relates to the creation and execution of wills, codicils or testamentary trusts.
>
> 2. Title 47, other than chapters 2 and 2A and § 47-1306 and as otherwise provided in § 44-7016.

A.R.S. 44-7003(B). The legislature's decision to allow for only two (2) exceptions implies that AETA *does* apply to A.R.S. § 20-259.01(B), despite Defendant's contention to the contrary.

AETA also states that "[a]ny transaction subject to this chapter is also subject to any other applicable substantive law." A.R.S. § 44-7003(D). Defendant apparently believes that the UM/UIM statute's written offer requirement is "applicable substantive law" within the meaning of A.R.S. § 44-7003(D). That cannot be the case because it would lead to an absurd result. It goes without saying that the phrase "any other applicable substantive law" cannot mean a requirement that a transaction be conducted in paper form, for such an interpretation would completely nullify AETA.

Progressive's preemption argument is as follows: Congress enacted E-SIGN and required that all States must either follow E-SIGN or adopt the uniform model act, UETA. Arizona adopted the uniform model act in the form of AETA. Thus, AETA preempts the written offer requirement in A.R.S. § 20-259.01, which would give legal effect to the electronic offer and acceptance of UM/UIM coverage made by Giant Electric. To the extent Defendant Palomera-Ruiz mistakenly argues that AETA exempted A.R.S. § 20-259.01, federal preemption would preclude such an enactment by the Arizona legislature. In other words, because Congress specifically required that E-SIGN apply to the business of insurance, if Arizona law were to somehow exempt the application of E-SIGN or AETA from applying to the business of insurance, including A.R.S. § 20-259.01, federal preemption would preclude such a statute and require the applicability of E-SIGN nevertheless. Consequently, even if Defendant's argument is correct that AETA exempts A.R.S. § 20-259.01 (which it does not), AETA would not apply, but E-SIGN would still apply. Therefore, any written offer requirement contained in A.R.S. § 20-259.01 is either preempted by AETA or E-SIGN or both. Regardless of whether E-SIGN or AETA applies, this Court must give legal effect to the electronic offer and acceptance of UM/UIM coverage which Progressive undisputedly made to Giant Electric.

C. A Recorded Phone Call Satisfies E-SIGN and AETA.

Surprisingly, Defendant disputes the idea that a recorded telephone call qualifies as an electronic record under E-SIGN and AETA. Defendant attempts to confine the definition of "electronic" to visual formats, arguing that Progressive's UM/UIM offer to Giant Electric did not involve a website, keyboard, email, or paper receipt. First, Giant Electric did receive a "visual" confirmation of the transaction in the form of the printed declarations page, which confirmed the chosen level of UM/UIM coverage. (*See* RSOF Nos. 6, 16-18 and Exhibit 1 to RSOF). It received a similar declarations page for the next six (6) years upon each renewal. (*See id.*). But more importantly, an electronic record need not be "visual". E-SIGN broadly states:

> The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

15 U.S.C. § 7006(4). AETA's definition is nearly identical:

> "Electronic record" means a record that is created, generated, sent, communicated, received or stored by electronic means.

A.R.S. § 44-7002(7).The recorded phone call was created, generated, sent, communicated, received, *and* stored by electronic means, even though E-SIGN and AETA only require that *one* of those criteria be

met. [*See* RSOF ¶ 3 for description of electronic recording process].

Likewise, E-SIGN's and AETA's definitions of "electronic" contain no reference to "visual" capability:

> The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

15 U.S.C. § 7006(2); *accord* A.R.S. § 44-7002(5) ("'Electronic' means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities."). Under these broad definitions, the recorded phone call is clearly "electronic". [*See* RSOF ¶ 3 for description of electronic recording process].

To further clarify the matter, Comment 4 to UETA § 2 explains that "electronic" includes biological, chemical as well as electromagnetic media:

> While not all technologies listed [in UETA § 2] are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. *However, whether a particular technology may be characterized*

> *as technically "electronic." i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This Act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.*

UETA § 2, comment 4. Defendant cannot dispute that the recorded phone call has been stored and "retrieved in perceivable form", so it is clearly "electronic". *Id.* Furthermore, Comment 6 to UETA § 2 also provides that even audio and video tape recordings constitute electronic records:

> 6. **"Electronic record."** An electronic record is a subset of the broader defined term "record." *It is any record created, used or stored in a medium other than paper* (see definition of electronic). . . .
>
> * * *
>
> Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, *audio and video tape recordings,* among other records, all would be electronic records under this Act.

UETA § 2, comment 6.[2]

Similarly, E-SIGN defines an "electronic signature" as follows:

> The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

---

[2] Defendant criticizes Progressive's argument that a tape recorded conversation satisfies the statute of frauds. *See, e.g.*, ***Londono v. City of Gainesville***, 768 F.2d 1223, 1227 (11th Cir. 1985), ***Ellis Canning Co. v. Bernstein***, 348 F.Supp. 1212, 1228 (D. Colo. 1972); *cf* ***People v. Avila***, 770 P.2d 1330 (Colo. Ct. App. 1988); ***Friedman v. Clark***, 248 A.2d 867 (Md. 1969). The point is that if a recorded conversation satisfies the statute of frauds (whose entire purpose is to ensure a writing), then it certainly satisfies the UM/UIM statute (whose purpose is merely to ensure that an offer is made). Moreover, Defendant does not even address the fact that Ariz. R. Evid. 1001 also applies to electronic recordings and provides in relevant part:

> (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
>
> (3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.

Ariz. R. Evid. 1001. Thus, even in the absence of E-SIGN and AETA, Progressive satisfied the requirements of Arizona's UM/UIM statute.

15 U.S.C. § 7006(5) (emphasis added); *accord* A.R.S. § 44-7002(8) ("'Electronic signature' means an electronic *sound,* symbol or process that is attached to or logically associated with a record and that is executed or adopted by an individual with the intent to sign the record.") (emphasis added). Giant Electric provided its "electronic signature" within the meaning of E-SIGN and AETA, by the *sound* of Mr. Thompson's voice when he orally declined Progressive's offer of UM/UIM coverage equal to the liability limits and orally accepted $100,000 UM/UIM limits. [*See* RSOF ¶¶ 13 & 15].

In light of the clear statutory language and legislative history set forth above, the recorded telephone call qualifies as an "electronic record" under E-SIGN and AETA and must be given legal effect.

D. Giant Electric and Progressive Both Consented to Do Business Electronically.

The Court should reject Defendant's contention that Giant Electric never consented to conduct business electronically. Defendant's limited notion of consent is incompatible with the applicable statutes. To require an agreement in paper form, or even to require any explicit agreement at all, would defeat the purposes of E-SIGN and AETA. Commentators have explained that "[t]he mere fact of use, or of behavior consistent with acceptance, by a party should be sufficient to evidence that party's willingness and to make applicable E-SIGN's base rule."

Robert A. Wittie & Jane K Winn, *Electronic Records And Signatures Under The Federal E-Sign Legislation And The UETA,* 56 BUS. LAW. 293, 299-300 (2000) (noting that "E-SIGN's rule is negative, providing only that parties are not required to use or accept them.").

Here, Progressive manifested its assent to do business electronically by advertising its 800 number. Giant Electric manifested its assent by calling the 800 number, agreeing to procure a policy, and selecting UM/UIM coverage orally over the phone. Although Defendant Palomera-Ruiz attempts to argue that Giant Electric never consented, Giant Electric has not joined in such an assertion. [*See* email correspondence from Giant Electric's counsel and Progressive's counsel, confirming that Giant Electric will not join in Palomera-Ruiz's Motion for Summary Judgment, attached hereto as Exhibit 1].

Furthermore, Defendant's discussion of 15 U.S.C. § 7001(c)(1)(C)(ii) is incomplete and inaccurate. 15 U.S.C. § 7001(c) applies only to "consumer disclosures." A consumer disclosure is information about a transaction that is required by statute to be disclosed to a consumer; for example, disclosures required by the Truth-In-Lending Act. Ethna M.S. Piazza, *Common Misconceptions Surround Electronic Transactions With Consumers,* 19 NO. 5 Intell. Prop. & Tech. L.J. 15, 15 (May 2007). See also, ***In re Lavigne***, 2007 WL 3469454 (Bkrtcy. E.D. Va. November 14, 2007) (holding that Federal Truth in Lending Act, 15 U.S.C.A. §§ 1601 *et seq.* is a consumer disclosure

statute because it requires, among other things, that the amount of negative equity be disclosed as a component of the purchase price."). Other examples of consumer disclosures are: (1) the consumer reporting agency's file that it reveals to the consumer as contemplated by 15 U.S.C. § 1681g, ***Johnson v. Equifax, Inc.***, 510 F.Supp.2d 638, 645 (S.D. Ala. 2007), and (2) Rule 10b-16 of the Securities Exchange Act of 1934 requiring the disclosure of, among other things, the annual rate of interest, ***Baden v. Craig-Hallum, Inc.***, 646 F.Supp. 483, 488 (D. Minn. 1986) (Rule 10b-16 is a consumer disclosure provision to protect investors). 15 U.S.C. § 7001(c) is inapplicable because Arizona's UM/UIM statute, A.R.S. § 20-259.01, is not a disclosure statute. It merely requires that an offer of UM/UIM coverage be made. ***State Farm v. Ash,*** 181 Ariz. 167, 173, 888 P.2d 1354, 1360 (App. 1994) ("The insurer need only make the written offer.").

Moreover, even if 15 U.S.C. § 7001(c) is applicable (it is not), E-SIGN allows for the consumer to consent electronically or confirm consent electronically "in a manner that reasonably demonstrates that the consumer can access the information in the electronic form that will be used to provide the information." 15 U.S.C. § 7001(c)(1)(C)(ii). As discussed above, Giant Electric *did* consent to do business electronically. Its actions in doing so "reasonably demonstrate[d] that [it could] access the information" in telephonic form, which was the same "electronic form" that was

used to "provide the information". *See* 15 U.S.C. § 7001(c)(1)(C)(ii).

However, Giant Electric's consent under 15 U.S.C. § 7001(c)(1)(C)(ii) was unnecessary, because E-SIGN clearly states that compliance with the consent requirement, 15 U.S.C. § (c)(1)(C)(ii), is not required in the case of a phone call:

> (6) Oral communications
>
> An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection [15 U.S.C. § 7001(c)] except as otherwise provided under applicable law.

15 U.S.C. § 7001(c)(6). Therefore, the consent requirement of § 7001(c)(1)(C)(ii) does not apply to oral communications, including the recorded phone conversation in this case. Moreover, the explicit exemption of recorded phone calls from E-SIGN's consent requirements further demonstrates that recorded phone calls *do* qualify as electronic records under the remainder of the statute. *See* Section C *supra*. After all, if oral communications and recordings of oral communications were not electronic records, then Congress would have no need to exclude them in subsection (c)(6).

Defendant also fails to address 15 U.S.C. § 7001(c)(3), which provides that an electronic contract is still valid even in the absence of consent:

> (c)(3) Effect of failure to obtain electronic consent or confirmation of consent
>
> The legal effectiveness, validity, or enforceability of any contract executed by a consumer *shall not be denied solely because of the failure to obtain* electronic consent or *confirmation of consent by that consumer* in accordance with paragraph (1)(C)(ii).

15 U.S.C. § 7001 (emphasis added).

Likewise, Defendant's discussion of AETA's consent requirement is incorrect. AETA's consent requirement provides:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is *determined from the context and surrounding circumstances, including the parties' conduct.*

A.R.S. § 44-7005(B) (emphasis added). Thus, the agreement to do business electronically may be implicit and "need not be in any particular form", but can be inferred from the parties' conduct. Robert A. Wittie & Jane K Winn, *Electronic Records And Signatures Under The Federal E-Sign Legislation And The UETA*, 56 BUS. LAW. 293 n.181 (2000).

The drafters of UETA explained that "it is essential that the parties' actions and words be *broadly construed* in determining whether the requisite agreement exists." UETA § 5, Comment 4 (emphasis

added). Once the intent to conduct a transaction electronically is established, AETA applies. *Id.* Contrary to Defendant's assertion, AETA does not require consent to be explicit or in a visual format. UETA Prefatory Note (A) states:

> [T]he construction of the term agreement must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, *regardless of whether the intent rises to the level of a formal agreement.*

UETA Prefatory Note (A).

Defendant's excessively narrow view of consent may work well where a preexisting business relationship has been established. But where, as here, a new customer initiates contact over the phone, it would be completely impracticable to require that: (1) the parties must end their phone conversation immediately; (2) the insurer must send a letter requesting the customer's consent to do business electronically; (3) the insured must send the letter back, indicating that he or she agrees to do business electronically; and finally, (4) the parties may resume their phone conversation. Such an approach is obviously time-consuming, ridiculous and not required by the statutory language. Such an approach would essentially undermine E-SIGN and AETA and result in hindrance of all electronic transactions and a return to paper transactions. This is clearly not what Congress or the Arizona legislature intended. Consequently, Giant Electric's conduct of willfully calling Progressive's

800 number was a sufficient manifestation of its consent to an electronic transaction and an electronic record.

E. Progressive Was Not Required to Provide Giant Electric with a Retainable Copy of the Electronic Offer.

Defendant argues that Progressive failed to satisfy the UM/UIM statute because Giant Electric allegedly did not receive anything to memorialize the oral communication. First, as discussed above, Giant Electric did receive a memorialization of the transaction in the form of the printed declarations page, which confirmed its chosen level of UM/UIM coverage. [*See* RSOF ¶¶ 6, 16-18 and Exhibit 1 to RSOF]. Giant Electric received a similar declarations page for the next six (6) years upon each renewal. [*Id.*]. Year after year, when Giant Electric received these memorializations, it never disagreed with the level of UM/UIM coverage shown thereon. In fact, neither Mr. Thompson nor Giant Electric disputes that the correct level of UM/UIM coverage is $100,000. [*See* Exhibit 1]. No one disputes, including Defendant Palomera-Ruiz, the accuracy of the recorded conversation. Defendant merely wants to elevate form over substance.

The recording certainly was available for Giant Electric to review had it asked for it. Stacey Koskinen, Applications Platform Engineer for Progressive, explained that Progressive maintains an

expansive recording system that records all inbound 800 calls into Progressive (except administrative 800 calls), including the November 12, 2001 conversation with Mr. Thompson on behalf of Giant Electric. [*See* Exhibit 3 to RSOF]. Although Giant Electric could have requested a copy of the recorded phone call, it chose not to do so.

More importantly, Palomera-Ruiz's argument fails because *A.R.S. § 20-259.01(B) does not require Progressive to "send" the UM/UIM offer to the insured.* The statute merely requires that an insurer "shall by written notice offer the insured" UM/UIM coverage up to the liability limits. A.R.S. § 20-259.01(B). The Arizona Supreme Court has held that the meaning of "offer" in the UM/UIM statute is "[t]o bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not" ***Tallent v. National General Ins. Co.***, 185 Ariz. 266, 267-68, 915 P.2d 665, 666-67 (1996) (citing BLACK'S LAW DICTIONARY 1081 (6th ed. 1990); Joseph M. Perillo, CORBIN ON CONTRACTS § 1.11 (revised ed. 1993) ("An offer is an expression by one party of assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express assent to the same terms."); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.")).

Consistent with ***Tallent***, there is no requirement of contemporaneous retention of the UM/UIM offer on the consumer's end. For example, if Progressive had made the offer to Giant Electric in paper form, it would not have been required to provide Giant Electric with a copy of the form after the selection was made. *See* ***State Farm v. Ash***, 181 Ariz. 167, 173-74, 888 P.2d 1354, 1360-61 (Ct. App. 1994) (holding that if a UIM offer is sent by mail in paper form, insurers are not required to prove that the insured actually received the offer). Defendant's proposed requirement of contemporaneous retention is simply not in the statute, and the Court should reject this invitation to add such a requirement. The purpose of A.R.S. § 20-259.01(B)'s written offer requirement is simply to prove that the insurer made an offer of coverage, not to facilitate the insured's recordkeeping.

Like the UM/UIM Statute, E-SIGN does *not* require Progressive to provide a contemporaneous, retainable copy of the UM/UIM offer to the insured. For the reasons set forth in Section D *supra*, Defendant's discussion of 15 U.S.C. § 7001(c)(1)(C)(ii) is completely inapplicable in this case because no disclosures were required and because it is a recorded phone call. Similarly, AETA does *not* require an insurer to provide a contemporaneous, retainable copy of a UM/UIM offer to the insured. Defendant misunderstands A.R.S. § 44-7008(A), which states in relevant part:

> If the parties to a transaction have agreed to conduct the transaction by electronic means and a law requires a person to *provide, send or deliver information* in writing to another person, *the requirement is satisfied* if the information is provided, sent or delivered, as the case may be, in an electronic record that is capable of retention by the recipient at the time of receipt.

A.R.S. § 44-7008(A) (emphasis added).

The phrase "the requirement is satisfied" indicates that *one way* to comply with the writing requirement is by providing, sending or delivering information via an electronic record that is capable of retention by the recipient at the time of receipt. The statute does not say that this is the *only way* to comply.

More importantly, A.R.S. § 44-7008(A) does not apply to the UM/UIM statute, because the UM/UIM statute does not require insurers to "provide, send or deliver information" or *anything* else to prospective customers. Rather, A.R.S. § 20-259.01(B) merely requires that an insurer offer UM/UIM coverage up to the liability limits. Again, if Progressive had made the offer to Giant Electric in paper form, it would not have been required to "provide, send or deliver information"; i.e., a copy of the paper to Giant Electric after it made its selection.

The UM/UIM statute is different from other Arizona insurance statutes, which do require insurers

to "provide", "send" or "deliver" certain information or documents to their insureds. *See, e.g.*, A.R.S. § 20-2104(A) ("An insurance institution or insurance producer *shall provide* a notice of information practices to applicants and policyholders in connection with insurance transactions as prescribed in this section.") (emphasis added); A.R.S. § 20-3102(B) ("If the claim is not a clean claim and the health care insurer requires additional information to adjudicate the claim, the health care insurer *shall send* a written request for additional information. . . .") (emphasis added); A.R.S. § 20-487.03 ("[T]he controlling producer *shall deliver* written notice to the prospective insured disclosing the relationship between the producer and the controlled insurer") (emphasis added).[3] Unlike these statutes, A.R.S. § 20-259.01(B) does not require the insurer to "provide, send or deliver" anything.

Forcing insurers to mail a copy of every piece of documentation relating to the insured's file as Defendant suggests would frustrate the purposes of E-SIGN and AETA and would insert a new requirement not contained in the UM/UIM statute. Contrary to Defendant's belief, Progressive was not required to provide Giant Electric with a retainable copy of the electronic offer.

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[3] *See also* A.R.S. § 20-1632.01(13) ("[T]he insurer *must mail* a notice of cancellation or nonrenewal to the policyholder at the policyholder's last address on record with the insurer by *first class mail*") (emphasis added).

F. Progressive Satisfied the Purpose of the UIM Statute.

The purpose of the UM/UIM statute's written offer requirement is merely to ensure that the offer is made. Defendant's arguments about the confusing nature of insurance and Mr. Thompson's alleged confusion about the difference between MedPay and UM/UIM coverage are irrelevant because ***Tallent v. National General Ins. Co.***, 185 Ariz. 266, 267, 915 P.2d 665, 666 (1996), held that Arizona's UM/UIM statute does not require insurers to explain UM/UIM coverage to insureds. Unlike Arizona's UM/UIM statute, statutes in some other states require that:

- Insurers must explain the nature of UM/UIM coverage to their policyholders. *See, e.g.*, ***Mollena v. Fireman's Fund Ins. Co. of Hawaii*** 72 Haw. 314, 816 P.2d 968, 971-73 (1991); ***State Farm Mut. Auto. Ins. Co. v. Wannamaker***, 291 S.C. 518, 354 S.E.2d 555, 556 (1987); ***Hastings v. United Pac. Ins. Co.***, 318 N.W.2d 849, 851-53 (Minn. 1982).

- The insured must expressly reject UM/UIM coverage. *See, e.g.*, ALA. CODE § 32-7-23; IND. CODE § 27-7-5-2; 36 OKLA. STAT. § 3636.

- The insurer must make the offer of UIM coverage on a form that is pre-approved by the state Department of Insurance. *See, e.g.*, FLA. STAT. ANN. § 627.727(1); *see also* N.Y. COMP. CODES R. & REGS. TIT. 11, § 60-2.2 (supplementary UM/UIM coverage notice must include the exact illustrative examples set forth in statute).

Such requirements do not exist in Arizona, where "[t]he insurer need only make the written offer." ***State Farm v. Ash***, 181 Ariz. 167, 173, 888 P.2d 1354, 1360 (App. 1994). In the paper form context, Progressive merely could have given Giant Electric a UM/UIM selection form, given the company's representative the option to read the form if it so chose, and then sign the document. Nothing more was required.

Despite having no obligation to do so, the recorded phone call indicates that Progressive's representative did explain the nature of UM/UIM coverage to Mr. Thompson. [*See* RSOF ¶ 11-15 & RSOF Exhibit 2]. By the end of the phone call, it was clear that even if Mr. Thompson was initially confused about the difference between MedPay and UM/UIM earlier, he was not confused by the end of the phone call. [*See Id.*]. Mr. Thompson ended up selecting a UM/UIM coverage limit of $100,000 (well above the $15,000 statutory minimum for liability insurance). Giant Electric repeated this selection for six (6) subsequent years. [*See* RSOF ¶¶ 15, 18]. Giant Electric does not argue that their President/CEO, Mr. Thompson, was confused, but nevertheless Defendant Palomera-Ruiz speculates that such confusion existed. However, Palomera-Ruiz provides no testimony, affidavit, or other evidence showing that Mr. Thompson was confused about or dissatisfied with the level of UM/UIM coverage by the end of the phone call or thereafter. Furthermore, as a non-party to the contract, Palomera-Ruiz has no standing to argue about

Giant Electric's alleged confusion during the recorded phone call. See, e.g., ***Ogden v. U.S. Fidelity & Guaranty Co.***, 188 Ariz. 132, 933 P.2d 1200 (App. 1996) (holding that employee did not have standing to assert reasonable expectations argument because he was not a party to the contract).

The Arizona Supreme Court has determined that the intent of the legislature in enacting A.R.S. § 20-259.01 was "to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others." ***Ball v. American Motorist***, 181 Ariz. 124, 126-27, 888 P.2d 1311, 1313-14 (Ariz. 1995) (quoting ***Ormsbee v. Allstate Ins. Co.***, 176 Ariz. 109, 859 P.2d 732 (1993)). In ***Ball*** (a case decided in 1995 before the digital age), Justice Martone held that the written offer requirement "is the only sure and uniform way to avoid credibility contests over whether such an offer was actually made." 181 Ariz. at 128, 888 P.2d at 1315. In this case, there is no credibility contest, because the "written" offer (in the form of the recorded phone call) proves that Progressive made the necessary UM/UIM offer to Giant Electric.

Ball is distinguishable from this case in ways that are fatal to Defendant's position. In ***Ball***, it was the *named insured* who argued that the higher limits should be applicable. Here, by contrast, even Giant Electric is not asking for the higher limits. [*See* Exhibit 1]. In fact, Giant Electric refused to join in Defendant's Motion for Summary Judgment, implicitly acknowledging the validity of the offer and the

selection made in the recorded phone call. [*Id.*] Moreover, ***Ball*** is factually distinguishable because it relied upon affidavits that were prepared for trial years after the event in question when the UM/UIM offer was originally made. Under those circumstances, the veracity of the affidavits could be questioned because at best they were imperfect recollections of what occurred years earlier and may not constitute an accurate recordation of what occurred. Those credibility problems do not exist in this case. In fact, the contemporaneous electronic recording of the telephone conversation is more reliable than the written requirement. There is no assurance that the insured would have read a UM/UIM selection form and understood it before signing it. Although the UM/UIM selection form attached as Exhibit 1 to Defendant's Response to Progressive's Cross-MSJ may conclusively satisfy the UM/UIM statute, an insurer is not required to use such a form, especially now in the digital age.

The most important distinction between ***Ball*** and the instant case is that ***Ball*** predated the passage of E-SIGN and AETA. There is no way for Defendant to get around the fact that ***Ball*** simply did not address the legal validity of a recorded phone call in light of these new statutes. Therefore, ***Ball*** is not controlling and is not dispositive.

IV. CONCLUSION

Based upon the foregoing, Progressive respectfully requests that this Court deny Defendant Palomera-Ruiz's motion for summary judgment. Instead, this Court should enter summary judgment in favor of Progressive, holding that the electronic recording of the UM/UIM selection should be given legal effect and that the policy provides UM/UIM limits of $100,000 per claim and $300,000 in the aggregate.

DATED this 12th day of February, 2008.

KUNZ PLITT HYLAND DEMLONG AND KLEIFIELD, P.C.

By: /s/ Daniel Maldonado

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ORIGINAL filed with the Clerk and a **COPY** provided to the Judge this 12th day of February, 2008.

. . . and a **COPY** of the foregoing mailed/served this same date to:

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/s/ Christine A. Valenzuela

EXHIBIT 1

John K. Wittwer

From: Monica Lindstrom [mlindstrom@davismiles.com]

Sent: Thursday, December 06, 2007 1:11 PM

To: John K. Wittwer

Cc: mgriblin

Subject: RE: Giant Electric

John,

I will not be filing a response or a joinder to the Motion for Summary Judgment in order to save my client's resources. Thank you for making sure I have been informed!

Sincerely,
Monica K. Lindstrom

Davis Miles, PLLC
560 West Brown Road, Third Floor, Mesa, AZ 85201
Telephone: 480-733-6800
Facsimile: 480-733-3748
Email: mlindstrom@davismiles.com

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From: John K. Wittwer [mailto:jkw@kunzlegal.com]
Sent: Wednesday, November 28, 2007 5:55 PM
To: Monica Lindstrom
Subject: RE: Giant Electric

Monica,

I was thinking that it may be more convenient for everyone, if you intend to respond in any way to the MSJ, that I could ask Frank Lesselyong for more time, so that everyone's deadlines would be coordinated. Once you get a chance to review the MSJ, please let me know if you would like me to contact Frank regarding that.

John

-----Original Message-----

From: John K. Wittwer
Sent: Tuesday, November 27, 2007 10:58 AM
To: 'mlindstrom@davismiles.com'
Cc: Daniel Maldonado; Christine A. Valenzuela
Subject: Giant Electric

Monica,

Per phone discussion this morning, please reply to this email to confirm that we are authorized to sign the stipulation on your behalf granting an extension of time up to and including December 7, 2007 for Progressive to respond to Palomera-Ruiz's Motion for Summary Judgment.

Thanks for your professional courtesy.

John

John K. Wittwer
Kunz Plitt Hyland Demlong & Kleifield
A Professional Corporation
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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff, vs. GIANT ELECTRIC CORPORATION, an Arizona Corporation; et al., Defendants.	NO. CV2007-012149 COURT OF APPEALS NO. 1 CA-CV08-0461

Phoenix, Arizona
April 14, 2008
1:35 p.m.

BEFORE: THE HONORABLE JANET E. BARTON
Superior Court Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

(Filed Jul. 24, 2008)

DUPLICATE ORIGINAL

BEVERLEE CAPERTON, RPR
Certified Reporter, #50030
Official Court Reporter to
Hon. Janet E. Barton

PREPARED FOR:
APPEAL

[2] APPEARANCES:

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[3] Phoenix, Arizona

Monday, April 14, 2008 – 1:36 p.m.

(Proceedings in the courtroom; Court and counsel present.)

THE COURT: All right. This is the time we have set for oral argument, and we are here in CV2007-012149. It's Progressive Casualty Insurance Company versus Giant Electric.

I have Mr. Maldonado and Mr. Plitt here for the plaintiff and Mr. Lesselyong for the defendants.

I show that we are here on a motion for summary judgment that was filed by Mr. Lesselyong dealing with the failure to give written notice of the uninsured motorist coverage, I think is what the issue is.

I have read everything that's been filed in connection with this motion for summary judgment, so please do not repeat what's already in the pleadings; but if you have any additional information to provide to the Court, this would be your opportunity to – to do so.

So, Mr. Lesselyong, this is your motion. You may go first.

MR. LESSELYONG: Thank you, your Honor.

May it please the Court, let me just simply [4] say it's an honor to be here.

By my account, Progressive Insurance in their 22-page reply raised 17 different issues that I could address here this afternoon.

THE COURT: I was kind of curious about that it's 22 pages. Was there permission to –

MR. LESSELYONG: Yes, there was –

THE COURT: – exceed the page limitation?

MR. LESSELYONG: – an order – and an order as well. There was.

THE COURT: Was that me?

MR. LESSELYONG: Yup.

THE COURT: Oh, my gosh, you must have caught me on a good day.

MR. LESSELYONG: I filed in opposition, too, but it was still granted.

THE COURT: Goodness, I must have had a really good day.

All right, go ahead.

MR. LESSELYONG: I'm not going to chase any of those 17 issues. I'm going to talk about three issues, and I'm going to talk for, hopefully, five minutes or less; and then I'm going to sit down, subject to any questions that the Court may have. The three issues that I do want to talk about is the applicability of the [5] federal E-SIGN statute; second, the applicability of the state statute; and, third, briefly touch upon a point of emphasis on the Ball case.

The main purpose – and it's hard to make this argument because I don't have case law to back it up, nor does Mr. Plitt have case law, because there is almost none – and I rechecked at the law library this morning – but there's lots of commentators and there's articles and there's Law Review articles.

But it seems very clear that the purpose of E-SIGN is – it's very limited in scope – the main purpose is to create a federal exemption to the statute of frauds by creating uniformity within the state.

Another clear rationale of the statute is to take an e-signature – you walk into Macy's, you walk into Talbot's, you walk into Target, you put your debit card into the machine and out pops the screen, and

you write with an e-signature. That now is the same, has the same legal effect, as a pen and paper signature.

Respectfully, your Honor, I submit that the language of the statute kills them, absolutely kills them. I have before you, I put on your – on your desk there, the federal statute, the state statute, and then the Ball case.

15 USC 701(B) says the statute doesn't limit [6] or alter any requirement imposed by law. It's designed to be complimentary. It's designed to sanction an e-signature.

701(C)(1)(a) requires that the consumer must affirmatively consent – which there is no evidence whatsoever of in this case – but prior to consent, they must be provided with a clear and conspicuous statement as to their rights under the statute, including the right to opt out of an electronic transaction.

(C)(2)(a) says, "Nothing in this chapter affects the content of any disclosure required by statute." I don't know what that means other than exactly the points that we've been raising in our pleading papers.

But my favorite is this. Of course, they're contending that a phone call – obviously, an oral phone call – that was recorded constitutes an electronic transaction, electronic record.

(C)(6) in the federal statute says – it's entitled "Oral Communication," and it says, "An oral communication or recording of an oral communication shall

not qualify as an electronic record." The federal statute doesn't apply.

Briefly, on the state statute, again, 7003(D) – and, of course, it's all under 44-70 – 7001, et [7] sequence, but 7003(D) – "Any transaction is also subject to other applicable substantive law" – and 7004(B) applies only when the parties – and I emphasize the plural – when the parties agree to conduct the transaction by electronic means.

Issue three, the Ball case, they tried to distinguish the Ball case by contending that they used affidavits in the Ball case that were years after the fact, and this is a contemporaneous recording and has sufficient reliability.

No, they missed a step. It's very important to emphasize that there are three different types of writings involved in the Ball case, and it is in the opinion. The insured in that case was a risk manager for Fleming Foods. He initiated a bidding process in writing and told various insurance companies what coverages he wanted. He wanted $3 million of the liability coverage, and he wanted the 15/30 minimum UM/UIM requirement.

Secondly, in the Ball case, they, too, received the declaration page or the dec sheet, as we call it.

And a third writing in the Ball case is that there was an affidavit where the risk manager said: "We know what it is. We understand what the law is. We [8] didn't want it then. Mrs. Ball got killed. We're

aware of that. It's too bad. But we don't want it now." And the Arizona Supreme Court, in a unanimous decision, said, "No, that is not sufficient."

The statute is very simple, and the statute is very clear, in writing you must advise the insured of their right to purchase UM and UIM coverage in an amount equal to the liabilities limits.

I think in our case, with an electrician as the insured – Mr. Christopher Thompson was an electrician – doesn't know anything about insurance law – we have better facts to suggest that the writing requirement is even more important.

Lastly, and I'm going to sit down in about 30 seconds, I have a superb opponent, he is highly respected, he's certified, and he literally wrote the book on Arizona insurance law, plus the supplement. There's not one word – there's lots of discussion about the Ball case – there's not one word in his treatise about this Internet theory that they're propounding here.

Great advocacy is still a poor substitute for cases on point. We have a case on point. And I challenge my opponent, Mr. Plitt, who I have great respect for, to do just what I've done. I've put a copy [9] of the Ball case on your desk symbolicly and in reality, so that when you make your ruling on this case – because I would imagine it's under advisement, the way most judges do – I want you to read the Ball case. And I challenge Mr. Plitt to tell us what case – federal case, state

case, appellate case, any case – does he want you to read, because they don't exist.

Thank you, your Honor. That's all I have.

THE COURT: Mr. Plitt, he's pretty much thrown the gauntlet down.

MR. PLITT: Sometimes you wish you didn't publish things, your Honor.

We need to go to the basics first. E-SIGN and Arizona's version were adopted in 2000. This communication was 2001. So, clearly, it – those statutes existed before the communication.

A.R.S. 44-7007(C) says, "Any – an electronic record satisfies any law that requires a record to be in writing." That is much broader than counsel suggested to you, that you go to the ATM, and that's what it's talking about, "any law."

What they – what the statute did was, Arizona was faced with E-SIGN, and the Arizona legislature could have gone through and identified every single statute; but rather than do that, they said, "Globally, we're [10] going to say any law that requires a writing." And then they made two exceptions, so they understood that they could exempt certain things, and those exemptions were not anywhere near A.R.S. Section 20-259.01. And then it goes on to say, if you look at 707 – 7007(A), that the record cannot be denied legal effect because it's electronic.

And the reason that's important here is, the issue is telling the insured, "You have options for more coverage." That has to be in writing, according to the Ball case, under the Ball facts; and the statute suggests it has to be in writing.

But that's the quality of the communication. You don't have to explain the "what ifs" or "wherefores." We know that from the Talon case. But you just simply have to say, "Here's the election." That was done verbally in this case, and we have that captured by the document that we have, or at least the transcription.

By the way, your Honor, I had a note, there is a cross-motion as well on the case –

THE COURT: Correct.

MR. PLITT: – and I just want to make sure.

The second thing I'd like to cover is this McCarran-Ferguson issue, which seems pretty obvious, [11] although McCarran-Ferguson jurisprudence is rather complicated. The bottom line is, is the states are allowed to regulate insurance to the exclusion of the federal government under McCarran-Ferguson, except to the extent the states' – the federal statute specifically addresses the business of insurance. And here, clearly and unequivocally, in 15 USC 7001(i) there is what they call the McCarran-Ferguson exemption. And you see that in just a few statutes because it's only in a few areas that the federal

government says, "We are preempting" – and in essence it's called "inverse preemption" – state law."

So we know McCarran-Ferguson doesn't apply. We know that the federal government by E-SIGN was stepping into the insurance marketplace, as well as other transactions, and we have that clearly from the statute.

The next issue I'd like to address is consent. Counsel is not entirely correct when he talks about (C)(6), your Honor, 15 USC 7001(C)(6), which is the consent requirement, because if you read the statute and you read the entirety of the federal statute, only for this section – and the way and methodology they do it is they say that for this purposes, for consent, the – the verbal – for this section, consent does not include [12] – or does not involve telephone calls or basically oral communications. And so you don't have the consent requirement for oral communications under the federal act – that's number one – and that the state statute cannot be more restrictive than the federal statute under the supremacy clause and federal preemption.

But even if we go to the state statute, the consent is also here, your Honor. If you look at 44-7005, subpart (B), if there – you have to look at the context and surrounding circumstances, including the parties' conduct. So what does the conduct show us.

First of all, the discussion is contemporaneous. Unlike Ball, we actually see the unfolding of the very conversation itself. And no one, no one has stood up,

not even Giant Electric or Mr. Thompson, and said it's inaccurate. No one has said that this didn't occur in the manner, in the way, it's – it's reflected.

So the transcription that you have as – as an exhibit is as authoritative and – and uncontroverted as it's going to be because no one contests it.

He calls a 1-800 number. He initiates the conversation to pick up the phone. And that's the consent that you're talking about, the consent to the transaction. He selects the limits. The conversation [13] is clear.

He then receives a declarations page following this verbal communication, which memorializes the very transaction. And so what he gets is a declarations page that specifically identifies the type of coverages that he agreed to in the conversation, the amount of coverage for each of those types of coverage, and the premium charges.

And what the record demonstrates by its silence is that he approves that. And for six subsequent renewals he keeps getting the same coverages – the dec keeps coming, he continues to pay his premiums – and so, your Honor, we've got the consent, if you look at the facts under Arizona's view of how you determine consent.

Simply, your Honor, the Ball case, it is true, I mean, a fair reading of the Ball case would suggest that Justice Martone felt that the easiest expedient in dealing with the statute in 1995 was to say, "Get a

requirement, get a written requirement," but you can't necessarily with a lot of certainty divorce that from the facts of the case.

What he wasn't presented with was this. What if there could be an e-courtroom that had the parties right then, right there, being recorded when they did [14] this transaction. Would that satisfy your trustworthiness. Would that satisfy the idea that you don't want to have competition down the road for after-the-accident events where people are trying to reconstruct something that occurred years ago.

I submit to you that the reason Ball is not applicable is that you can't read Ball as taking any kind of position on this, what we now have in our courtrooms, electronically, digitally, recorded in realtime. And that's exactly what we have.

And so I don't disagree with counsel that if you read Ball in its limited sense, it says what it says; but I don't think you can say that that was a statement that covered this unique type of situation.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Lesselyong, any final words?

MR. LESSELYONG: Nothing, your Honor.

THE COURT: All right. With respect to the motion for summary judgment, I am going to grant the motion for summary judgment and I am going to deny the cross-motion for summary judgment.

And I remember you being in here a week or so ago, Mr. Plitt, and wanted to know if I was going to be the judge who's going to go up to the Court of Appeals [15] with my name on something. Well, I'm not going to be the judge that goes up to the Court of Appeals and disregards a Supreme Court decision that's directly on point.

So I understand your arguments. I appreciate your arguments. You may have some very valid arguments. Your client, the insurance industry, might very well want to go to the legislature and try to get this statute amended. But this deals with a telephone conversation. Telephones were invented at the time this statute was passed. Recording telephone conversations was not something that was unusual. The statutes specifically state that it has to have – there has to be a written notice offer of uninsured motorist coverage in limits not less than the liability limits for bodily injury or death contained in the policy.

The Arizona Supreme Court has said that statute means what it says. You have to have a written notice offer; and in the absence of a written notice offer, the policy has, I guess by de facto – or by default – uninsured provisions of $1 million, or whatever the policy was in this case. I think it was $1 million.

I would encourage you, if you think this is something that the Court of Appeals wants to take a look [16] at, take it to the Court of Appeals. But based upon the Ball decision and the existing case law, I am

going to follow the specific wording of the statute and go with written notice.

So, for that reason, I am going to grant the motion for summary judgment that was filed by the – I guess it was the plaintiff in this case?

MR. PLITT: Defendant, your Honor.

MR. LESSELYONG: Defendant.

THE COURT: – defendant in this case. I'm going to deny the motion for summary – cross-motion for summary judgment that was filed by the plaintiff.

Now we also have in front of us a motion to withdraw. That's for Giant Electric Company.

MR. LESSELYONG: No objection.

MR. PLITT: No objection, your Honor.

THE COURT: All right. And then there's also – was filed a motion to continue on the inactive calendar and to request a Rule 16 scheduling conference.

MR. PLITT: Your Honor, I think that your ruling basically resolves the case pending appeal.

THE COURT: All right.

MR. LESSELYONG: I agree.

THE COURT: So then basically what I – I think – are you on the inactive calendar at the present [17] time?

MR. LESSELYONG: I think we are, your Honor.

THE COURT: Can you see, pull it up on your computer and see?

Because what I'm thinking about doing is, it sounds like you might want to just go ahead and get some kind of a stipulation to judgment executed, file it with the Court, I can sign it; and then if you want to take it up on appeal, that will get you that much closer to doing so.

So what I'm thinking is maybe just placing the case on the inactive calendar for 45 days so that you can get that worked out and submit it to the Court.

MR. PLITT: Fair enough, your Honor.

MR. LESSELYONG: Good.

(Discussion off the record between the Court and the clerk.)

THE COURT: It should say something on – if you're in docket, it should say something about a 150-day minute entry.

(Conference off the record between the Court and the clerk.)

THE COURT: It says: Motion to set has to be filed by April 1; and then if it's not filed, it will be dismissed on June 2.

[18] So, basically, what I will do is just not extend it on the inactive calendar. So you're set for a June 2nd dismissal date in this case.

MR. PLITT: That's plenty of time.

THE COURT: So get a stipulation filed, a proposed form of judgment, and we'll get it executed, and you can move on down the line.

And I think that takes care of everything today. Thank you.

MR. PLITT: Thank you.

MR. LESSELYONG: Thank you, your Honor.

(Proceedings concluded at 1:56 p.m.)

* * *

[19] CERTIFICATE

I HEREBY CERTIFY that the proceedings had upon the foregoing Oral Argument are contained in the shorthand record made by me thereof, and that the foregoing pages constitute a full, true, and correct transcript of said shorthand record, all done to the best of my skill and ability.

Dated at Phoenix, Arizona, this 21st day of April, 2008.

/s/ Beverlee Caperton

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IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION I

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff-Appellant, vs. ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; Giant Electric Corporation, an Arizona corporation, Defendants-Appellee.	1 CA-CV 09-0065 Maricopa County Superior Court NO. CV2007-012049

APPELLANT'S OPENING BRIEF

(Filed Feb. 12, 2009)

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE/STATEMENT OF THE FACTS 1

ISSUES PRESENTED 4

STANDARD OF REVIEW 9

ARGUMENT 10

I. THE TRIAL COURT ERRED IN FAILING TO INTERPRET THE UIM STATUTE FLEXIBLY IN LIGHT OF NEW TECHNOLOGIES AND BUSINESS MODELS IN THE INSURANCE INDUSTRY 10

II. PALOMERA-RUIZ'S CHALLENGE TO THE ELECTRONIC FORM OF PROGRESSIVE'S OFFER OF UIM COVERAGE VIOLATES THE LETTER AND INTENT OF FEDERAL AND STATE STATUTES DESIGNED TO VALIDATE ELECTRONIC TRANSACTIONS 18

A. Electronic Signatures in Global and National Commerce Act 18

B. Arizona Electronic Transactions Act 20

III. THE UIM STATUTE'S WRITTEN OFFER REQUIREMENT IS PREEMPTED TO THE EXTENT THAT IT PURPORTS TO INVALIDATE AN ELECTRONIC OFFER 244

IV. A RECORDED PHONE CALL SATISFIES E-SIGN AND AETA 288

V. THE STATUTE OF FRAUDS RECOGNIZES TAPE RECORDINGS AS "WRITINGS" 31

VI. GIANT ELECTRIC AND PROGRESSIVE BOTH CONSENTED TO DO BUSINESS ELECTRONICALLY 32

VII. PROGRESSIVE WAS NOT REQUIRED TO PROVIDE GIANT ELECTRIC WITH A RETAINABLE COPY OF THE ELECTRONIC OFFER 35

VIII. THE RECORDED PHONE CALL SATISFIED THE PURPOSE OF THE UM/UIM STATUTE 40

IX. THE RECORDED PHONE CALL SATISFIED *BALL V. AMERICAN MOTORIST INSURANCE CO.*, 181 ARIZ. 124, 888 P.2d 1311 (1995), BY, AMONG OTHER THINGS, AVOIDING CREDIBILITY CONTESTS 42

CONCLUSION 48

CERTIFICATE OF SERVICE 50

CERTIFICATE OF COMPLIANCE 52

TABLE OF AUTHORITIES

Cases

20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216, 878 P.2d 566, 32 Cal.Rptr.2d 807 (Cal. 1994) 13

Ball v. American Motorist Ins. Co., 181 Ariz. 124, 888 P.2d 1311 (1991) ..... passim

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Ogden v. U.S. Fidelity & Guaranty Co., 188 Ariz. 132, 933 P.2d 1200 (Ct. App. 1996) 8, 44, 52

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Statutes

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15 U.S.C. § 7001.....20, 34

15 U.S.C. § 7001(a).....21

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15 U.S.C. § 7001(c)(1)(C)(ii).....6, 34, 39

15 U.S.C. § 7001(c)(3).....6, 34

15 U.S.C. § 7001(c)(6) 34
15 U.S.C. § 7001(i) 5, 25
15 U.S.C. § 7006 20
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15 U.S.C. § 7006(4) 29
15 U.S.C. § 7006(5) 31
36 OKLA. STAT. § 3636 43
A.R.S. § 20-259.01 ..... 4, 5, 6, 28, 42, 49
A.R.S. § 20-259.01(B) ..... passim
A.R.S. § 20-1632.01(B) 40
A.R.S. § 20-2104(A) 40
A.R.S. § 20-3102(B) 40
A.R.S. § 20-487.03 40
A.R.S. § 44-101 32
A.R.S. § 44-7001 et seq. ..... passim
A.R.S. § 44-7002(5) 23, 30
A.R.S. § 44-7002(7) 23, 29
A.R.S. § 44-7002(8) 31
A.R.S. § 44-7003(B) 27
A.R.S. § 44-7003(D) 27, 28
A.R.S. § 44-7005(B) 7, 35
A.R.S. § 44-7006 ..... 20, 22
A.R.S. § 44-7006(1) 22
A.R.S. § 44-7006(3) 26
A.R.S. § 44-7007 ..... 22, 23

A.R.S. § 44-7007(C) 23, 26

A.R.S. § 44-7008(A) 39

ALA. CODE § 32-7-23 43

FLA. STAT. ANN. § 627.727(1) 43

FLA. STAT. ANN. § 627.728 18

IND. CODE § 27-7-5-2 43

N.Y. COMP. CODES R. & REGS. TIT. 11, § 60-2.2 43

Pub. L. No. 106-102, 1999 U.S.C.A.N. (113 Stat.) 1338 11

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Rules

Ariz. R. Evid. 1001 ..... 23, 24

Constitutional Provisions

U.S. CONST. art. VI 28

STATEMENT OF THE CASE/ STATEMENT OF THE FACTS

Progressive Casualty Insurance Company ("Progressive") brought this action pursuant to A.R.S. § 12-1831, the Arizona Declaratory Judgment Act, seeking a declaration that the insurance policy it issued to Defendant/Appellee Giant Electric had uninsured/underinsured motorist ("UM/UIM") coverage limits of $100,000 per claim and $300,000 in the aggregate. [*See* Index of Record on Appeal ("ROA") 1]. On November 12, 2001, Progressive received a telephone call from Christopher W. Thompson, the President/CEO of Giant Electric, applying for insurance with Progressive. [Exhibit 2 to ROA 20]. The telephone conversation was electronically recorded. [Exhibits 2 and 3, ROA 20]. Mr. Thompson requested liability insurance in the amount of $1,000,000. [Exhibit 2 to ROA 20, at 8:294-96, 11:424]. During the conversation, Mr. Thompson informed Progressive that his previous policy with Hartford Insurance Company of the Midwest had $1,000,000 of uninsured motorist and underinsured motorist (UM/UIM) coverage. [Exhibit 2 to ROA 20, at 13:505-509]. During the conversation, Mr. Thompson was informed that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. [Exhibit 2 to ROA 20, at 12:486-87]. During the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. [Exhibit 2 to ROA 20, at 18:724-19:7901. During the conversation,

Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. [*Id.*]. In response, Mr. Thompson chose $100,000 of UM/UIM coverage. [*Id.*]. Thereafter, Progressive issued a commercial auto policy ("Policy") to Giant Electric for the policy term of January 5, 2001 through January 1, 2002. [Exhibit 1 to ROA 20]. The Policy provided coverage with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. [*Id.*]. The Policy was renewed for six (6) successive years with the same UM/UIM coverage limits. [*Id.*].

On or about September 12, 2006, Jose Juan Palomera-Ruiz was involved in an automobile accident, in which he sustained fatal injuries. [ROA 1, ¶ 20; ROA 15, at 3:24]. Defendant/Appellee Estate of Jose Juan Palomera-Ruiz ("Palomera-Ruiz") demanded $1,000,000 to settle his UM/UIM claim arising out of the accident, alleging that the selection of UM/UIM limits by Giant Electric was ineffective and that the Policy provides UM/UIM coverage limits in the amount equal to the liability limits. [ROA 1, ¶ 21, 22, 24]. Palomera-Ruiz relied on Arizona's UM/UIM statute, A.R.S. § 20-259.01(B), which provides in relevant part:

> Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and *shall by written notice offer* the insured and at the request of the insured shall include within the policy underinsured

> motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy.

(Emphasis added).

Palomera-Ruiz and Progressive filed Cross Motions for Summary Judgment on the issue of whether the recorded phone conversation satisfied the above statute's "written notice" requirement. [ROA 15, 19]. Giant Electric did not join in Palomera-Ruiz's Motion for Summary Judgment. [ROA 15; Exhibit 1 to ROA 39]. The trial court granted Palomera-Ruiz's Motion for Summary Judgment and denied Progressive's Cross Motion for Summary Judgment. [ROA 68]. The trial court entered judgment in favor of Giant Electric and Palomera-Ruiz, holding that the Policy's UM/UIM limits were $1,000,000 at the time of the September 12, 2006 accident. [ROA 68]. The trial court reasoned that the judicial decision of ***Ball v. American Motorist Insurance Co.***, 181 Ariz. 124, 888 P.2d 1311 (1995), required this result. [Transcript of 4/14/08 Oral Argument at 17:1-4]. Judgment was entered on November 25, 2008. [ROA 68]. Progressive filed a timely notice of appeal on December 23, 2008. [ROA 73].

ISSUES PRESENTED

1. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment because the recorded phone call memorializing the UM/UIM offer satisfies the legislative intent in enacting Arizona's UM/UIM statute, A.R.S. § 20-259.01, and the judicial decision of ***Ball v. American Motorist Insurance Co.***, 181 Ariz. 124, 888 P.2d 1311 (1995), by, among other things, avoiding credibility contests?

2. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment because ***Ball***, *supra*, is factually distinguishable because it relied upon affidavits prepared for trial, years after the UM/UIM offer was made, whereas the contemporaneous electronic recording of the UM/UIM offer to Giant Electric is an accurate recordation of events as they transpired, and is not subject to post-accident conspiracies that the ***Ball*** court expressed concerns about?

3. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because the legislature enacted Arizona's UM/UIM statute, A.R.S. § 20-259.01, prior to the widespread use of new technologies and business models in the insurance industry, such as the Internet and recorded phone transactions, and thus, the UM/UIM statute must be interpreted flexibly in light of those new developments?

4. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment because, to the extent Arizona's UM/UIM statute, A.R.S. § 20-259.01, and ***Ball***, *supra*, purport to deny legal effect, validity, or enforceability to a transaction solely because it is in electronic form, the UM/UIM statute and the ***Ball*** case are preempted by the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), Pub.L. 106-229, June 30, 2000, 114 Stat. 464?

5. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because subsequent to the enactment of the UM/UIM statute and subsequent to ***Ball***, *supra*, the legislature passed the Arizona Electronic Transactions Act ("AETA"), A.R.S. § 44-7001 et seq., which provides, *inter alia*, that an electronic record satisfies any law that requires a record to be in writing?

6. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because, pursuant to 15 U.S.C. § 7001(i), Congress specifically intended for E-SIGN to "apply to the business of insurance", and thereby, E-SIGN preempts AETA to the extent, if any, that AETA exempts A.R.S. § 20-259.01 from its application?

7. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because the recorded telephone conversation constitutes an "electronic record" within the meaning of E-SIGN and AETA?

8. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because the disclosure requirements of 15 U.S.C. § 7001(c) are inapplicable, where Arizona's UM/UIM statute, A.R.S. § 20-259.01, is not a disclosure statute?

9. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because even if 15 U.S.C. § 7001(c) is applicable, E-SIGN allows for the consumer to consent electronically, which Giant Electric did by calling Progressive's 800 number, agreeing to procure a policy, and selecting UM/UIM coverage orally over the phone?

10. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because Giant Electric's consent under 15 U.S.C. § 7001(c)(1)(C)(ii) was unnecessary, where E-SIGN clearly states that compliance with the consent requirement, 15 U.S.C. § (c)(1)(C)(ii), is not required in the case of a phone call?

11. Did the trial court err when it denied Progressive's Cross Motion for Summary Judgment, because 15. U.S.C. § 7001(c)(3) provides that an electronic contract is still valid even in the absence of consent?

12. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because Giant Electric's "agree[ment] to conduct a transaction by electronic means" under A.R.S. § 44-7005(B) can be inferred from its conduct in calling Progressive's 800 number, agreeing to procure a policy, and selecting

UM/UIM coverage orally over the phone, where A.R.S. § 44-7005(B) explicitly provides for a party's "conduct" to be considered in determining whether there was such an agreement?

13. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because unlike other Arizona insurance statutes, Arizona's UM/UIM statute, A.R.S. § 20-259.01(B), does not require the insurer to "provide", "send" or "deliver" anything to the insured, including the written offer of UM/UIM coverage?

14. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment because, despite the fact that Progressive was not required to provide Giant Electric with a retainable copy of the electronic offer, Giant Electric did receive a memorialization of the transaction in the form of the printed declarations page, which confirmed its chosen level of UM/UIM coverage, as well as similar declarations pages for the next six (6) years upon each renewal, without ever disputing the level of UM/UIM coverage shown thereon?

15. Did the trial court err in denying Progressive's Cross Motion for Summary Judgment, because ***Tallent v. National General Ins. Co.***, 185 Ariz. 266, 267, 915 P.2d 665, 666 (1996), held that Arizona's UM/UIM statute does not require insurers to explain UM/UIM coverage to insureds?

STANDARD OF REVIEW

Issues of summary judgment are reviewed by appellate courts *de novo*. ***Sanchez v. City of Tucson***, 191 Ariz. 128, 130, 953 P.2d 168, 170 (1998). Similarly, questions of statutory construction are issues of law reviewed *de novo*. ***Wilmot v. Wilmot***, 203 Ariz. 565, 569, 58 P.3d 507, 511 (2002). All of the evidence and inferences from the evidence should be viewed most favorably to appellant. ***Wells Fargo Bank v. Arizona Laborers***, 201 Ariz. 474, 482, 38 P.3d 12, 20 (2002).

ARGUMENT

I. *THE TRIAL COURT ERRED IN FAILING TO INTERPRET THE UIM STATUTE FLEXIBLY IN LIGHT OF NEW TECHNOLOGIES AND BUSINESS MODELS IN THE INSURANCE INDUSTRY.*

The insurance industry is much different today than it was when the current version of A.R.S. § 20-259.01(B) was originally enacted. The traditional role of an insurance agent in the sale of insurance products to potential policyholders changed dramatically over the years. Historically, the agent was the customer's first and only point of contact. However, insurance companies eventually began to provide consumers with additional access points for insurance sales, including the Internet and direct insurance

sales through toll-free telephone numbers. Deborah S. Freeman, *Exploration of Policyholder Information Ownership Rights under the Three Existing Insurance Agency Systems in the United States*, 23 W. NEW ENG. L. REV. 409, 409 (2002) (hereinafter *"Policyholder Information"*) ("[I]nsurance companies have begun to provide consumers with additional access points for sales, such as the Internet . . . [and] . . . toll-free telephone numbers."). Today, the Internet and other new technologies, as well as the modern "direct writer" business model, have gained immense popularity.

Insurers such as Progressive have increasingly used many different channels to sell insurance. *See* Insurance Information Institute, Glossary of Insurance Terms, available at http://www.iii.org/individuals/glossary/alfa.D/ (last visited 9/8/08). In the mid- to late-1990s, businesses began offering products on the Internet, and consumers were soon clamoring for online functionality for their insurance needs. *See* Practising Law Institute, *Fourth Annual Internet Law Institute: Remote Banking and Financial Services*, 610 PLI/PAT 809, 840-41 (June 2000) (hereinafter *"Internet Law Institute"*). In a survey conducted around the year 2000, "45% of computer-owning households reported they rarely or never visited an agent or broker in person." *Id.* at 839.

Prior to 1999, significant regulatory barriers prevented banks from selling insurance. But in 1999, Congress passed the Gramm-Leach-Bliley Act (Financial Services Modernization Act of 1999), Pub. L. No. 106-102, 1999 U.S.C.A.N. (113 Stat.) 1338, which

eliminated many of those barriers. *See*, Thomas Lee Hazen, *Fundamentals of Securities Law: Relation of Securities Laws to Other Laws*, SM052 ALI-ABA 23 (June 21-22, 2007). The Gramm-Leach-Bliley Act had the effect of infusing the insurance marketplace with a new group of competitors, bringing the insurance industry "under assault" from banks and other segments of the financial services industry. *See, e.g.*, Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. BANKING INST. 221, 221 (Apr. 2000). This competitive pressure, along with the growth of the Internet, "undermine[d] the role of the independent agents that previously were responsible for the delivery of much of the insurance products sold in America." *Id.*

Consequently, many insurers began shifting from an "agency" business model to a "direct writer" model. Direct writers are insurance companies that "sell directly to the public using exclusive agents or their own employees," for example, by telephone or via the Internet. *See* Insurance Information Institute, Glossary of Insurance Terms, available at http://www.iii.org/individuals/glossary/alfa.D/ (last visited 9/8/08); *see also Internet Law Institute*, *supra*, at 837 (describing early efforts by Progressive to underwrite auto insurance risks and issue binders in minutes over the Internet); *Markham*, *supra*, at 275 ("Allstate Insurance Company announced in November of 1999 that it would be selling car and home insurance directly to consumers through the Internet and over the telephone."); *Policyholder Information*, 23 W. NEW ENG. L. REV.

at 420 ("With the development of the Internet and e-commerce, many insurance companies anticipate soliciting potential policyholders online directly through their properly licensed employees, as order-takers only, with virtually no efforts on the part of those employees to generate that business.").

In addition, niche insurance companies such as USAA and GEICO were able to access specific populations, and "therefore, did not ever really need independent or exclusive insurance agents to obtain their customers." *Policyholder Information*, 23 W. NEW ENG. L. REV. 420-21 (2002); *see also* ***20th Century Ins. Co. v. Garamendi***, 8 Cal.4th 216, 257, 878 P.2d 566, 591, 32 Cal.Rptr.2d 807, 832 (Cal. 1994) (noting that 20th Century Insurance Company is a direct writer of insurance, and therefore did not employ or utilize captive or independent agents). This was yet another competitive force which gave rise to the trend toward direct writers.

Furthermore, the direct writer system gained a foothold because it was a speedier way of doing business. For example, "for many personal lines insurance transactions, underwriting and policy issuance can occur almost instantaneously online." *Internet Law Institute*, *supra*, at 837; *see also* John L. Romaker & Virgil B. Prieto, *Expectations Lost: Bank of The West v. Superior Court Places the Fox in Charge of the Henhouse*, 29 CAL. W. L. REV. 83, 135 (Fall 1992) (noting that insurance policies are purchased over the telephone). Obviously, telephone transactions provide many of these same speed

advantages. *Cf. Mutual Funds and The Internet: Current Industry Practice, The New E-Signature Law, And Recent Sec Pronouncements*, SF33 ALI-ABA 25 (October 2000) ("recognizing that '[i]n today's markets, where speed is a priority, significant matters often are communicated telephonically,' and that 'business can be transacted as effectively over the telephone today as it can in paper'"). In fact, the Policy in this case was approved instantly over the phone.

This new trend is not limited to the insurance industry. Similar technological advancement has spread to every aspect of life, including credit card companies, banks, and utilities, to name a few. Notably, the courts have also recognized and adopted new technologies. For example, electronic filing is mandatory in the federal court system and in some Arizona state court cases as well. Electronic courtroom displays are becoming more prevalent. *See* Samuel H. Solomon & Suzan Flamm, *Admissibility of Digital Exhibits in Litigation*, SM057 ALI-ABA 419 (Oct. 26-28, 2006). Status conferences and oral arguments are now often conducted telephonically. *See* Robert V. Alvarado, Jr., *Telephonic Court Appearances: Reduce Litigation Costs the Easy Way*, 26-MAY AM. BANKR. INST. J. 34 (2006). This Court may take judicial notice that courts across the country, including Arizona, are moving from stenographic to digital recording of courtroom proceedings. *See* Helen W. Gunnarsson, *Making an Electronic Record: Good Reviews for Digital Recording*, 94 ILL. B.J. 72, 74 (Feb. 2006). Increased trustworthiness and reliability are major

benefits of this technological shift. *Id.* ("Judges who preside over hearings that are electronically recorded . . . give the system high marks. [Quoting certain judges who agree that] the best thing about electronic recording is that it's '100 percent accurate' – even more so than live court reporters, who are required to pass a test with 98 percent accuracy to become certified."). Audio recording is more reliable than a writing, because one never knows if the signatory actually read what he or she was signing. By contrast, with an audio recording, one can observe and decide any disputes based on the actual content of what was said during the conversation.

These technological advancements, including the modern insurance business model which utilizes direct writers, create important implications for the statutory construction of A.R.S. § 20-259.01(B). When a consumer buys an insurance product over the phone, "a licensed agent will probably be involved, but a recorded acceptance will be utilized instead of a written application." Michael A. Eubanks & Melissa M. Schwartz, *Practice Tips, Accidental Death Claims: In-House Counsel's Perspective*, 30 BRIEF 62, 62 (Fall 2000).

Obviously, times have changed since 1981, when the Arizona legislature added the "written notice" requirement in A.R.S. § 20-259.01(B). That was before insurers were doing significant business on the Internet, before the passage of the Gramm-Leach-Bliley Act, and before the direct writer business model was nearly as pervasive as it is today. Since

then, the legislature has never directly addressed the problems concomitant with the new trend of buying insurance directly over the Internet/telephone and similar issues arising from the direct writer system by modifying the statute directly. The statute is silent as to how the "written notice" requirement should be interpreted in light of the new modes of doing insurance business, such as the Internet, direct phone contact, email, and so forth.[1]

Fortunately, this is not the first time courts have been faced with the task of interpreting insurance statutes in light of post-amendment technological and industry developments. In similar cases where the statute is silent as to its applicability to direct writers, courts have taken a flexible approach that focuses on fulfilling the intent of the legislature rather than rigidly adhering to outdated business models.

For example, in ***Wellman v. GEICO General Ins. Co.***, 931 So. 2d 1046 (Fla. App. 2006), GEICO was a "direct" issuer of automobile insurance, selling over the telephone or the Internet. Wellman called GEICO and purchased automobile insurance directly, with no agent involved. Wellman was subsequently involved in an automobile collision and made a GEICO claim. GEICO immediately sent a written reservation

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[1] *See* Section II(B) for a discussion of the Arizona legislature's global modification of all Arizona laws, including A.R.S. § 20-259.01(B), to reflect the digital age and electronic transactions

of rights explaining that the policy had been cancelled for non-payment of premium prior to the accident. A Florida statute provided that an insurer's notice of cancellation is not effective "unless mailed or delivered by the insurer to the named insured *and to the named insured's insurance agent*." FLA. STAT. ANN. § 627.728 (emphasis added). The statute, however, is silent regarding cancellation notice to agents where the policy was issued by a direct writer. In ***Wellman***, GEICO did not send notice to an agent, since there was no agent involved. Despite failing to adhere to the strict letter of the statute, the court held that GEICO's cancellation was valid. The court reasoned that "[a] direct insured gains no benefit by our imposing additional notice obligations on the insurer beyond those exercised here." ***Id.*** at 1048; *see also* ***Teachers Ins. Co. v. Bollman***, 617 So. 2d 817, 818-19 (Fla. App. 1993) (holding that insured knowingly rejected stacked uninsured motorist coverage where insured, after discussing rates for stacked uninsured motorist coverage with her agent, directed Memorandum to agent instructing him to change automobile policies from stacked coverage to unstacked coverage "as discussed last week on the telephone," even though written rejection was not on statutorily prescribed form).

As set forth in the foregoing cases, courts take a flexible approach because of the new business model involving telephonic and online transactions. Here, the trial Court erred in failing to interpret the UIM statute flexibly in light of these new technologies and

ways of doing business. This Court should utilize *de novo* review of the UIM statute and give legal effect to the recorded phone call.

II. *PALOMERA-RUIZ'S CHALLENGE TO THE ELECTRONIC FORM OF PROGRESSIVE'S OFFER OF UIM COVERAGE VIOLATES THE LETTER AND INTENT OF FEDERAL AND STATE STATUTES DESIGNED TO VALIDATE ELECTRONIC TRANSACTIONS.*

A. Electronic Signatures in Global and National Commerce Act

Congress acted in light of the dramatic changes affecting the various ways of doing business, including the business of insurance. Effective October 2000, more than a year before the November 2001 telephone call between Progressive and Giant Electric, Congress passed the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), Pub.L. 106-229, June 30, 2000, 114 Stat. 464. In so doing, Congress sought to facilitate the use of electronic records and signatures in e-commerce. 145 Cong. Rec. S14,881 (daily ed. Nov. 19, 1999) (Congressional finding that the growth of e-commerce in the private sector is in the national interest); *id.* at S14,882 (statement of Sen. Lott that e-commerce "is a significant driving force behind our nation's robust and expanding economy."). E-SIGN states in relevant part:

> (a) In general
>
> Notwithstanding any statute, regulation, or other rule of law (other than this subchapter

> and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –
>
> (1) a signature, contract, *or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form*; and
>
> (2) a contract relating to such transaction *may not be denied legal effect*, validity, or enforceability solely because an electronic signature or *electronic record was used in its formation*.

15 U.S.C. § 7001 (emphasis added).

The statute provides the following definitions:

> (2) Electronic
>
> The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
>
> * * *
>
> 4) Electronic record
>
> The term "electronic record" means a contract or other record created, generated, sent, communicated, received, *or stored by electronic means*.

15 U.S.C.A. § 7006 (emphasis added).

This broad definition is technology neutral and is intended to encompass a wide range of electronic

recordings, including telephonic recordings. Notwithstanding the broad application of E-SIGN, Palomera-Ruiz contends (and the trial court agreed) that the electronic recording of the UM/UIM offer and acceptance made to Giant Electric should be denied legal effect simply because it is in electronic form, rather than on paper. However, Progressive's electronic recording of the telephone call fits directly within E-SIGN's definition of "electronic record". [*See* Exhibit 3 to ROA 20 for description of Progressive's electronic recording process]. Thus, pursuant to E-SIGN, the electronically recorded telephone call in which Progressive offered UM/UIM limits between $15,000 and $1 million satisfies the "written notice" requirement of A.R.S. § 259.01(B) and must be given legal effect.[2] Contrary to the trial court's conclusion, the mere fact that the UM/UIM offer was not made in writing does not mean that it should be denied legal effect. E-SIGN applies notwithstanding any Arizona

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[2] Since the passing of E-SIGN, insurers' use of voice recordings have been approved as being equivalent to a writing. For example, in 2004, the Office of General Counsel representing the view of the New York State Insurance Department issued an Official Opinion that a life insurance agent may "have an applicant sign a life insurance application by the entry of their social security number into an interactive voice response (IVR) system using a telephone keypad." N.Y Office of Gen. Counsel Op No. 04-08-15 (2004) The Opinion stated that both E-SIGN and New York's Electronic Signature and Records Act support the "use and acceptance of electronic signatures and electronic records in commercial transactions, and confirm their legal validity." *Id.*

statute or regulation to the contrary. 15 U.S.C. § 7001(a).

B. Arizona Electronic Transactions Act

Consistent with the congressional passage of the Electronic Signatures in Global and National Commerce Act, in 2000, the Arizona legislature passed the Arizona Electronic Transactions Act ("AETA"), A.R.S. § 44-7001 et seq. AETA provides in relevant part:

> Legal recognition of electronic records, signatures and contracts
>
> A. A record or signature in electronic form cannot be denied legal effect and enforceability solely because the record or signature is in electronic form.
>
> B. A contract formed by an electronic record cannot be denied Legal effect and enforceability solely because an electronic record was used in its formation.
>
> C. An electronic record satisfies any law that requires a record to be in writing.

A.R.S. § 44-7007.

The legislature stated that AETA should be construed and applied to:

> 1. Facilitate electronic transactions consistent with other applicable law.

> 2. Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.
>
> 3. Effectuate its general purpose to make uniform the law of this state with respect to the subject of this chapter for intrastate, interstate and international transactions.

A.R.S. § 44-7006.

Thus, AETA is similar to and consistent with E-SIGN. Rather than modifying each and every statute in Arizona containing an "in writing" or "written" requirement, the Arizona legislature enacted a statute that had global effect on and modified all Arizona laws, including A.R.S. § 20-259.01(B). A.R.S. § 44-7006(1). The Arizona legislature wanted all Arizona laws to reflect the digital age and allow for electronic transactions, including telephonic and internet transactions. AETA provides that "an electronic record satisfies ***any law*** that requires a record to be in writing." A.R.S. § 44-7007(C) (emphasis added). Consequently, the UM/UIM selection form required under Arizona law as evidence that the insured accepted or rejected UM/UIM coverage can be created and stored by electronic means and still satisfies the statute. Accordingly, this Court must give this electronic transaction legal effect.

The analysis here is nearly identical to the one set forth above in regards to E-SIGN. The recorded telephone call between Giant Electric and Progressive is an "electronic record" under AETA because it was

created, generated, sent, communicated, received or stored by electronic means. A.R.S. § 44-7002(7).[3] [*See* Exhibit 3 to ROA 20 for description of Progressive's electronic recording process]. AETA provides that an electronic record satisfies any law that requires a record to be in writing. A.R.S. §44-7007. Hence, the electronically recorded telephone call at issue in this case satisfies A.R.S. § 20-259.01(B).[4]

Commentators have explained that electronic records are the equivalent of paper records:

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[3] "Electronic" means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities A R S § 44-7002(5) Clearly, the electronically recorded telephone call meets this criteria.

[4] Furthermore, Ariz R. Evid. 1001 provides in relevant part.

> (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation
>
> (3) Original An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it

The electronically recorded telephone conversation between Mr Thompson and Progressive qualifies as a writing within the meaning of the above-quoted provision Therefore, even in the absence of E-SIGN, under AETA and Ariz. R Evid 1001, Progressive satisfied the requirements of Arizona's UIM statute.

> [The Uniform Electronic Transactions Act, or "UETA", the model act upon which AETA is based,] accomplishes this goal by making electronic records . . . equivalent to paper records. In short, UETA allows parties to focus on the message they are trying to convey rather than on the medium in which it is presented.

David E. Ewan, John A. Richards, & Margo H. K. Tank, *It's the Message, Not the Medium! Electronic, Record and Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments*, 60 BUS. LAW. 1487, 1491 (2005). The trial court's failure to give effect to Progressive's offer of UM/UIM coverage is based *solely* on the electronic form of the offer. Such an argument is directly contrary to both the letter and the intent of E-SIGN and AETA. Therefore, the trial court erred and Progressive is entitled to summary judgment in its favor.

III. *THE UIM STATUTE'S WRITTEN OFFER REQUIREMENT IS PREEMPTED TO THE EXTENT THAT IT PURPORTS TO INVALIDATE AN ELECTRONIC OFFER.*

The trial court erred in denying Progressive's Motion for Summary Judgment, because both E-SIGN and AETA preempt the Arizona UM/UIM statute to the extent that the UM/UIM statute purports to require an offer of UM/UIM coverage in paper form.

E-SIGN specifically relates to the business of insurance, providing in relevant part:

> (i) Insurance
>
> It is the specific intent of the Congress that this subchapter and subchapter II of this chapter *apply to the business of insurance.*

15 U.S.C. § 7001(i) (emphasis added).

Therefore, "inverse preemption" under the McCarran-Ferguson Act[5] does *not* apply. Section 2 of the McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . *unless such Act specifically relates to the business of insurance.*

15 U.S.C. § 1012(b) (emphasis added). Construing 15 U.S.C. § 7001(i) and 15 U.S.C. § 1012(b) together, it is clear that E-SIGN preempts A.R.S. § 20-259.01(B) to the extent that A.R.S. § 20-259.01(B) purports to invalidate an electronic offer of UM/UIM coverage.

Likewise, AETA invalidates A.R.S. § 20-259.01(B) to the extent that A.R.S. § 20-259.01(B) purports to require an offer of UM/UIM coverage in paper form. The Prefatory Notes to the model UETA act lend

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[5] 15 U S.C. § 1011 *et seq.*

support for the proposition that the electronic offer made to Giant Electric should be given legal effect:

> The need for certainty as to the scope and applicability of this Act is critical, and makes any sort of a broad, general exception based on notions of inconsistency with existing writing and signature requirements unwise at best. The uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws is unacceptable if electronic transactions are to be facilitated.

UETA Prefatory Note (A).

Rather than modifying each and every statute in Arizona containing an "in writing" or "written" requirement, the Arizona legislature enacted AETA in order to achieve a global effect on and modify all Arizona laws, including A.R.S. § 20-259.01(B). *See* A.R.S. § 44-7006(3) (stating that AETA should be construed and applied to "make uniform the law of this state"); A.R.S. § 44-7007(C) (providing that "an electronic record satisfies *any law* that requires a record to be in writing.") (emphasis added). Consequently, the UM/UIM written offer requirement under Arizona law can be made and/or stored by electronic means because it still satisfies the statute's requirement of evidence that the insured accepted or rejected UM/UIM coverage.

Importantly, the legislature could have exempted Arizona's UM/UIM statute from the scope of AETA, but it chose not to. Section 3 of the model UETA lists

three (3) specific areas of law which are exempt from its scope, and also allows States that adopt the model act to exempt other laws as well:

> (b) This [Act] does not apply to a transaction to the extent it is governed by:
>
> (1) a law governing the creation and execution of wills, codicils, or testamentary trusts;
>
> (2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];
>
> (3) [the Uniform Computer Information Transactions Act]; and
>
> **(4) [other laws, if any, identified by State].**

UETA § 3 (scope) (emphasis added). However, the Arizona legislature enacted only the first two (2) exceptions and declined to create new exceptions, including declining to adopt a specific exception for the UM/UIM statute. The Arizona version of the subsection quoted above states:

> B. This chapter does not apply to a transaction to the extent the transaction is governed by:
>
> 1. Title 14 as it relates to the creation and execution of wills, codicils or testamentary trusts.
>
> 2. Title 47, other than chapters 2 and 2A and § 47-1306 and as otherwise provided in § 44-7016.

A.R.S. 44-7003(B). The legislature's decision to allow for only two (2) exceptions implies that AETA *does* modify A.R.S. § 20-259.01(B).

AETA also states that "[a]ny transaction subject to this chapter is also subject to any other applicable substantive law." A.R.S. § 44-7003(D). Palomera-Ruiz argued at the trial court level that the UM/UIM statute's written offer requirement is "applicable substantive law" within the meaning of A.R.S. § 44-7003(D). That cannot be the case because it would lead to an absurd result. It goes without saying that the phrase "any other applicable substantive law" cannot mean a requirement that a transaction be conducted in paper form, for such an interpretation would completely nullify AETA.

To the extent Palomera-Ruiz mistakenly argues that AETA exempted A.R.S. § 20-259.01, federal preemption would preclude such an enactment by the Arizona legislature. The Supremacy Clause provides that where states and the federal government pass legislation on the same subject matter, the federal law is supreme, and the conflicting state law is rendered void. *See* U.S. CONST. art. VI. Because Congress specifically required that E-SIGN apply to the business of insurance, if Arizona law were to somehow exempt the application of E-SIGN or AETA from applying to the business of insurance, including A.R.S. § 20-259.01, federal preemption would preclude such a statute and require the applicability of E-SIGN nevertheless. Consequently, even if AETA exempts A.R.S. § 20-259.01 (which it does not), AETA would

not apply, but E-SIGN would still apply. Therefore, any written offer requirement contained in A.R.S. § 20-259.01 is either preempted by AETA or E-SIGN or both. Regardless of whether E-SIGN or AETA applies, this Court should reverse the trial court and give legal effect to the electronic offer and acceptance of UM/UIM coverage which Progressive undisputedly made to Giant Electric.

IV. *A RECORDED PHONE CALL SATISFIES E-SIGN AND AETA.*

Palomera-Ruiz disputes the proposition that a recorded telephone call qualifies as an electronic record under E-SIGN and AETA. He attempts to confine the definition of "electronic" to visual formats, arguing that Progressive's UM/UIM offer to Giant Electric did not involve a website, keyboard, email, or paper receipt. First, Giant Electric did receive a "visual" confirmation of the transaction in the form of the printed declarations page, which confirmed the chosen level of UM/UIM coverage. (*See* Exhibit 1 to ROA 20). It received a similar declarations page for the next six (6) years upon each renewal. (*See id.*). But more importantly, an electronic record need not be "visual". E-SIGN broadly states:

> The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

15 U.S.C. § 7006(4). AETA's definition is nearly identical:

> "Electronic record" means a record that is created, generated, sent, communicated, received or stored by electronic means.

A.R.S. § 44-7002(7). Here, the recorded phone call was created, generated, sent, communicated, received, *and* stored by electronic means, even though E-SIGN and AETA only require that *one* of those criteria be met. [*See* Exhibit 3 to ROA 20 for description of Progressive's electronic recording process].

Likewise, E-SIGN's and AETA's definitions of "electronic" contain no reference to "visual" capability:

> The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

15 U.S.C. § 7006(2); *accord* A.R.S. § 44-7002(5) ("'Electronic' means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities."). Under these broad definitions, the recorded phone call is clearly "electronic". [*See* Exhibit 3 to ROA 20 for description of Progressive's electronic recording process].

To further clarify the matter, Comment 4 to UETA § 2 explains that "electronic" includes biological, chemical as well as electromagnetic media:

> While not all technologies listed [in UETA § 2] are technically "electronic" in nature

> (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. *However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This Act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.*

UETA § 2, comment 4. Palomera-Ruiz cannot dispute that the recorded phone call has been stored and "retrieved in perceivable form", so it is clearly "electronic". *Id.* Furthermore, Comment 6 to UETA § 2 also provides that even audio and video tape recordings constitute electronic records:

> 6. "**Electronic record**." An electronic record is a subset of the broader defined term "record." *It is any record created, used or stored in a medium other than paper* (see definition of electronic). . . .
>
> * * *

> Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, *audio and video tape recordings*, among other records, all would be electronic records under this Act.

UETA § 2, comment 6.

> Similarly, E-SIGN defines an "electronic signature" as follows: The term "electronic signature" means an electronic *sound*, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

15 U.S.C. § 7006(5) (emphasis added); *accord* A.R.S. § 44-7002(8) ("'Electronic signature' means an electronic *sound*, symbol or process that is attached to or logically associated with a record and that is executed or adopted by an individual with the intent to sign the record.") (emphasis added). Giant Electric provided its "electronic signature" within the meaning of E-SIGN and AETA, by the *sound* of Mr. Thompson's voice when he orally declined Progressive's offer of UM/UIM coverage equal to the liability limits and orally accepted $100,000 UM/UIM limits. [*See* Exhibit 2 to ROA 20, at 18:724-19:790].

In light of the clear statutory language and legislative history set forth above, the recorded telephone call qualifies as an "electronic record" under E-SIGN and AETA and must be given legal effect.

It was error for the trial court to deny Progressive's Cross Motion for Summary Judgment.

V. *THE STATUTE OF FRAUDS RECOGNIZES TAPE RECORDINGS AS "WRITINGS".*

Similar to A.R.S. § 20-259.01(B), Arizona's Statute of Frauds, A.R.S. § 44-101 contains an "in writing" requirement. The statute of frauds requires that certain enumerated agreements or promises be in writing and signed by the party charged. Arizona courts have not addressed whether an electronic recording of a telephonic conversation constitutes a "writing" for the purposes of the statute of frauds. Other jurisdictions have held that a tape recorded conversation satisfies the statute of frauds. See, e.g., ***Londono v. City of Gainesville***, 768 F.2d 1223, 1227 (11th Cir. 1985) ("the tape recording of the City Commission's action at the meeting satisfies the statute of frauds requirement of a signed writing."); ***Ellis Canning Co. v. Bernstein***, 348 F.Supp. 1212, 1228 (D. Colo. 1972) (holding that tape recorded oral contract satisfied "writing" requirement of statute of frauds); cf., ***People v. Avila***, 770 P.2d 1330 (Colo. Ct. App. 1988) (finding recording on computer disk was a "writing" for purposes for forgery statute); ***Friedman v. Clark***, 248 A.2d 867 (Md. 1969) (testimony recorded in open court will, under appropriate circumstances, take case out of statute of frauds).

Although not directly applicable, Arizona's statute of frauds also lends support for the contention

that the electronic recording of the UM/UIM offer satisfies the "writing requirement" of A.R.S. § 20-259.01(B) and should be given legal effect.

VI. *GIANT ELECTRIC AND PROGRESSIVE BOTH CONSENTED TO DO BUSINESS ELECTRONICALLY.*

Palomera-Ruiz contends that the recorded phone call should be denied legal effect because Giant Electric never consented to conduct business electronically. This limited notion of consent is incompatible with the applicable statutes. To require an agreement in paper form, or even to require any explicit agreement at all, would defeat the purposes of E-SIGN and AETA. Commentators have explained that "[t]he mere fact of use, or of behavior consistent with acceptance, by a party should be sufficient to evidence that party's willingness and to make applicable E-SIGN's base rule." Robert A. Wittie & Jane K Winn, *Electronic Records And Signatures Under The Federal E-Sign Legislation And The UETA*, 56 BUS. LAW. 293, 299-300 (2000) (noting that "E-SIGN's rule is negative, providing only that parties are not required to use or accept them.").

Here, Progressive manifested its assent to do business electronically by advertising its 800 number. Giant Electric manifested its assent by calling the 800 number, agreeing to procure a policy, and selecting UM/UIM coverage orally over the phone. Although Palomera-Ruiz contends that Giant Electric never

consented, Giant Electric did not join in such an assertion. [*See* Exhibit I to ROA 39].

Moreover, Giant Electric's consent was unnecessary, because E-SIGN clearly states that compliance with its consent requirement, 15 U.S.C. § 7001(c)(1)(C)(ii), is not required in the case of a phone call:

> (6) Oral communications
>
> An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection [15 U.S.C. § 7001(c)] except as otherwise provided under applicable law.

15 U.S.C. 7001(c)(6). Therefore, the consent requirement of § 7001(c)(1)(C)(ii) does not apply to oral communications, including the recorded phone conversation in this case. Moreover, the explicit exemption of recorded phone calls from E-SIGN's consent requirements further demonstrates that recorded phone calls *do* qualify as electronic records under the remainder of the statute. *See* Section V *supra*. After all, if oral communications and recordings of oral communications were not electronic records, then Congress would have no need to exclude them in subsection (c)(6).

Furthermore, 15 U.S.C. § 7001(c)(3) provides that an electronic contract is still valid even in the absence of consent:

> (c)(3) Effect of failure to obtain electronic consent or confirmation of consent
>
> The legal effectiveness, validity, or enforceability of any contract executed by a consumer *shall not be denied solely because of the failure to obtain* electronic consent or *confirmation of consent by that consumer* in accordance with paragraph (1)(C)(ii).

15 U.S.C. § 7001 (emphasis added).

Likewise, AETA's consent requirement provides:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is *determined from the context and surrounding circumstances, including the parties' conduct.*

A.R.S. § 44-7005(B) (emphasis added). Thus, the agreement to do business electronically may be implicit and "need not be in any particular form", but can be inferred from the parties' conduct. Robert A. Wittie & Jane K Winn, *Electronic Records And Signatures Under The Federal E-Sign Legislation And The UETA*, 56 BUS. LAW. 293 n.181 (2000).

The drafters of UETA explained that "it is essential that the parties' actions and words be *broadly construed* in determining whether the requisite agreement exists." UETA § 5, Comment 4 (emphasis added). Once the intent to conduct a transaction electronically is established, AETA applies. *Id.* AETA does not

require consent to be explicit or in a visual format. UETA Prefatory Note (A) states:

> [T]he construction of the term agreement must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, *regardless of whether the intent rises to the level of a formal agreement.*

UETA Prefatory Note (A).

Palomera-Ruiz's excessively narrow view of consent may work well where a preexisting business relationship has been established. But where, as here, a new customer initiates contact over the phone, it would be completely impracticable to require that: (1) the parties must end their phone conversation immediately; (2) the insurer must send a letter requesting the customer's consent to do business electronically; (3) the insured must send the letter back, indicating that he or she agrees to do business electronically; and finally, (4) the parties may resume their phone conversation. Such an approach is obviously time-consuming, impractical, and not required by the statutory language. Such an approach would essentially undermine E-SIGN and AETA and result in hindrance of all electronic transactions and a return to paper transactions. This is clearly not what Congress or the Arizona legislature intended. Consequently, Giant Electric's conduct of willfully calling Progressive's 800 number was a sufficient manifestation of its consent to an electronic transaction and an electronic record.

VII. *PROGRESSIVE WAS NOT REQUIRED TO PROVIDE GIANT ELECTRIC WITH A RETAINABLE COPY OF THE ELECTRONIC OFFER.*

In the trial court, Palomera-Ruiz argued that Progressive failed to satisfy the UM/UIM statute because Giant Electric allegedly did not receive anything to memorialize the oral communication. First, as discussed above, Giant Electric *did* receive a memorialization of the transaction in the form of the printed declarations page, which confirmed its chosen level of UM/UIM coverage. [*See* Exhibit 1 to ROA 20]. Giant Electric received a similar declarations page for the next six (6) years upon each renewal. [*Id.*]. Year after year, when Giant Electric received these memorializations, it never disagreed with the level of UM/UIM coverage shown thereon. In fact, neither Mr. Thompson nor Giant Electric disputes that the correct level of UM/UIM coverage is $100,000, as Progressive contends. [*See* Exhibit 1 to ROA 39]. No one disputes, including Palomera-Ruiz, the accuracy of the recorded conversation. Palomera-Ruiz merely wants to elevate form over substance.

The recording certainly was available for Giant Electric to review had it asked for it. Stacey Koskinen, Applications Platform Engineer for Progressive, explained that Progressive maintains an expansive recording system that records all inbound 800 calls into Progressive (except administrative 800 calls), including the November 12, 2001 conversation with Mr. Thompson on behalf of Giant Electric. [*See*

Exhibit 3 to ROA 20]. Although Giant Electric could have requested a copy of the recorded phone call, it chose not to do so.

More importantly, Palomera-Ruiz's argument fails because *A.R.S. § 20-259.01(B) does not require Progressive to "send" the UM/UIM offer to the insured.* The statute merely requires that an insurer "shall by written notice offer the insured". UM/UIM coverage up to the liability limits. A.R.S. § 20-259.01(B). The Arizona Supreme Court has held that the meaning of "offer" in the UM/UIM statute is "[t]o bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not." ***Tallent***, 185. Ariz. at 267-68, 915 P.2d at 666-67 (citing BLACK'S LAW DICTIONARY 1081 (6th ed. 1990); Joseph M. Perillo, CORBIN ON CONTRACTS § 1.11 (revised ed. 1993) ("An offer is an expression by one party of assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express assent to the same terms."); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.")).

Consistent with ***Tallent***, there is no requirement of contemporaneous retention of the UM/UIM offer on the consumer's end. For example, if Progressive had made the offer to Giant Electric in paper form, it would not have been required to provide Giant

Electric with a copy of the form after the selection was made. *See* ***State Farm Mutual Auto Ins. Co. v. Ash***, 181 Ariz. 167, 173-74, 888 P.2d 1354, 1360-61 (Ct. App. 1994) (holding that if a UIM offer is sent by mail in paper form, insurers are not required to prove that the insured actually received the offer). Palomera-Ruiz's proposed requirement of contemporaneous retention is simply not in the statute, and the Court should reject his invitation to add such a requirement. The purpose of A.R.S. § 20-259.01(B)'s written offer requirement is simply to prove that the insurer made an offer of coverage, not to facilitate the insured's recordkeeping.

Like the UM/UIM Statute, E-SIGN does *not* require Progressive to provide a contemporaneous, retainable copy of the UM/UIM offer to the insured. For the reasons set forth in Section VI *supra*, 15 U.S.C. § 7001(c)(1)(C)(ii) is completely inapplicable in this case because no disclosures were required and because it is a recorded phone call. Similarly, AETA does *not* require an insurer to provide a contemporaneous, retainable copy of a UM/UIM offer to the insured.

Similarly, AETA does not require the insurer to provide, send, or deliver the UM/UIM offer to the insured. A.R.S. § 44-7008(A) states in relevant part:

> If the parties to a transaction have agreed to conduct the transaction by electronic means and a law requires a person to *provide, send or deliver information* in writing to another person, *the requirement is satisfied* if the information is provided, sent or delivered, as

> the case may be, in an electronic record that is capable of retention by the recipient at the time of receipt.

A.R.S. § 44-7008(A) (emphasis added).

The phrase "the requirement is satisfied" indicates that *one way* to comply with the writing requirement is by providing, sending or delivering information via an electronic record that is capable of retention by the recipient at the time of receipt. The statute does not say that this is the *only way* to comply.

More importantly, A.R.S. § 44-7008(A) does not apply to the UM/UIM statute, because the UM/UIM statute does not require insurers to "provide, send or deliver information" or *anything* else to prospective customers. Rather, A.R.S. § 20-259.01(B) merely requires that an insurer offer UM/UIM coverage up to the liability limits. Again, if Progressive had made the offer to Giant Electric in paper form, it would not have been required to "provide, send or deliver information"; *i.e.*, a copy of the paper to Giant Electric after it made its selection.

The UM/UIM statute is different from other Arizona insurance statutes, which do require insurers to "provide", "send" or "deliver" certain information or documents to their insureds. *See, e.g.*, A.R.S. § 20-2104(A) ("An insurance institution or insurance producer *shall provide* a notice of information practices to applicants and policyholders in connection with insurance transactions as prescribed in this

section.") (emphasis added); A.R.S. § 20-3102(B) ("If the claim is not a clean claim and the health care insurer requires additional information to adjudicate the claim, the health care insurer *shall send* a written request for additional information. . . .") (emphasis added); A.R.S. § 20-487.03 ("[T]he controlling producer *shall deliver* written notice to the prospective insured disclosing the relationship between the producer and the controlled insurer") (emphasis added).[6] Unlike these statutes, A.R.S. § 20-259.01(B) does not require the insurer to "provide, send or deliver" anything.

Forcing insurers to mail a copy of every piece of documentation relating to the insured's file as Palomera-Ruiz suggests would frustrate the purposes of E-SIGN and AETA and would insert a new requirement not contained in the UM/UIM statute. Contrary to Palomera-Ruiz's belief, Progressive was not required to provide Giant Electric with a retainable copy of the electronic offer.

---

[6] *See also* A.R.S. § 20-1632.01(B) ("[T]he insurer *must mail* a notice of cancellation or nonrenewal to the policyholder at the policyholder's last address on record with the insurer by *first class mail*") (emphasis added).

VIII. *THE RECORDED PHONE CALL SATISFIED THE PURPOSE OF THE UM/UIM STATUTE.*

The trial court's ruling is based upon a misunderstanding of the current state of law in Arizona and the purpose behind A.R.S. § 20-259.01(B). A.R.S. § 20-259.01(B) provides in relevant part:

> Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and *shall by written notice offer* the insured and at the request of the insured shall include within the policy underinsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy.

(Emphasis added).

The 1981 amendment to the statute originally required that insurers offer UM/UIM coverage by written notice. ***Tallent***, 185 Ariz. at 311, 915 P.2d at 619 (Toci, J., *dissenting*); Joel DeCiancio, *Legislative Review S.B. 1445 – The Legislature's Attempt to Reverse Judicial Treatment of Uninsured and Underinsured Motorist Coverage in Arizona*, 30 ARIZ. ST. L.J. 469, 472 (1998) (discussing history of UM/UIM insurance in Arizona) (hereinafter *"Legislative Review"*). A.R.S. § 20-259.01 has had a written notice requirement in one form or another for nearly twenty-seven (27) years. This written notice

requirement, however, is based upon the old model of the insurance business rather than the new digital, business model as previously discussed. It also predates E-SIGN and AETA.

The Arizona Supreme Court has determined that the intent of the legislature in enacting A.R.S. § 20-259.01 was "to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others." ***Ball***, 181 Ariz. at 126-27, 888 P.2d at 1313-14 (quoting ***Ormsbee v. Allstate Ins. Co.***, 176 Ariz. 109, 859 P.2d 732 (1993)). This intent requires "that all persons who purchase automobile liability insurance be offered in writing the option to purchase additional . . . UIM coverage in limits up to those they choose for their bodily injury liability coverage." ***Ash***, 181 Ariz. at 172, 888 P.2d at 1359; *see also Legislative Review*, 30 ARIZ. ST. L.J. at 484-85 ("With the mandatory offer intact, the courts will likely hold that the legislature targeted these coverages so that consumers could make informed decisions on whether to purchase, and in what amounts, protection for their families against irresponsible drivers.").

Thus, the purpose of the written offer requirement is simply to ensure that the offer is made. Here, Mr. Thompson undisputedly had the opportunity to choose higher UIM limits. And despite having no obligation to do so, the recorded phone call indicates that Progressive's representative explained the nature of UM/UIM coverage to Mr. Thompson. [*See* Exhibit 2 to ROA 20, at 12:486-87; 13:505-509; 18:724-19:790].

Indeed, Mr. Thompson ended up selecting a UM/UIM coverage limit of $100,000 (well above the $15,000 statutory minimum for liability insurance). Giant Electric repeated this selection for six (6) subsequent years. [*See* Exhibit 1 to ROA 20]. Because Progressive undisputedly offered Giant Electric the option to purchase higher UIM limits, the purpose of the UIM statute was satisfied.

IX. *THE RECORDED PHONE CALL SATISFIED BALL V. AMERICAN MOTORIST INSURANCE CO., 181 ARIZ. 124, 888 P.2d 1311 (1995), BY, AMONG OTHER THINGS, AVOIDING CREDIBILITY CONTESTS.*

In granting Palomera-Ruiz's Motion for Summary Judgment and denying Progressive's Cross Motion for Summary Judgment, the trial court incorrectly reasoned that it was constrained by ***Ball***, 181 Ariz. at 124; 888 P.2d at 1311. [Transcript of 4/14/08 Oral Argument at 17:1-4 ("[B]ased upon the Ball decision and the existing case law, I am going to follow the specific wording of the statute and go with written notice.")].

In ***Ball***, the estate of an employee who was killed in an accident with an underinsured motorist brought suit against the employer's automobile insurer seeking UIM coverage under the employer's policy. 181 Ariz. at 124-25, 888 P.2d at 1311-12. The Superior Court entered summary judgment for the insurer, finding that the employer had waived the statutory

requirement that a written offer of UIM coverage be made to the named insured. ***Id.*** The Court of Appeals affirmed. ***Id.*** The Supreme Court reversed, holding that the employer as named insured under the policy could not waive the statutory requirement that the insurer extend a written offer of UIM coverage. ***Id.*** at 127, 888 P.2d at 1314.

The trial court's reliance on ***Ball*** was misplaced because ***Ball*** is factually distinguishable in ways that are fatal to Palomera-Ruiz's case. In ***Ball***, the carrier contended that the UM/UIM requirement was waived, and the insured agreed. However, that assertion was based upon affidavits attached to a motion for summary judgment, where the risk manager testified that the insured company did not want and would have rejected any offer of UIM coverage. The carrier argued that when the insurer and named insured agree that the named insured did not want UIM, and the named insured so informed the insurer, the written offer requirement is waived. In ***Ball*** (a case decided in 1995 before the enactment of E-SIGN and AETA), Justice Martone held that the written notice requirement "is the only sure and uniform way to avoid credibility contests over whether such an offer was actually made." 181 Ariz. at 128, 888 P.2d at 1315.

The ***Ball*** case is factually distinguishable because it relied upon affidavits that were prepared years after the event in question when the UM/UIM offer was made. The affidavits were prepared for trial. Under that circumstance, the veracity of the

affidavits could be questioned because they were imperfect recollections of what occurred years earlier and may not constitute an accurate recordation of what occurred. The affidavits were also subject to manipulation because the parties (insured and carrier) could conspire together to deprive the injured claimant of the benefits of the policy.

No such credibility issues arise in this case. A contemporaneous electronic recording of the conversation where the UM/UIM offer is made to Giant Electric is not subject to imperfect recollections years later by the parties. The electronic recording is an accurate recordation of the events as they transpired. This Court can review the recording (and the transcript of the recording) to determine exactly what was said by Progressive and by Giant Electric. This is no different from the electronic recordings made during court proceedings to obtain an accurate recollection of the events that transpired. As a result, an electronic recordation is not subject to post-accident conspiracies by the parties that Justice Martone expressed concerns about.

In fact, the electronic recording of the telephone conversation is more reliable than the written requirement. There is no assurance that the insured would have read a UM/UIM selection form and understood it before signing it. The insured could have been simply given the form and signed it. Under Arizona law, the Court must legally presume that the insured read the document and signed it after reading. In this case, the communications between Giant

Electric and Progressive are recorded so that this Court can know for sure that the issue of UM/UIM coverage was discussed, the various coverage limits offered, and the desired coverage amount selected by the insured, Giant Electric. Consequently, the contemporaneous electronic recordation or the conversation is better evidence as compared to a written selection form.

Moreover, since ***Ball***, other jurisdictions have held that express rejection of UM/UIM coverage can be oral or written provided that the facts reliably demonstrate an intentional express rejection. *See e.g.*, ***Williams v. Nationwide Prop. & Cas. Ins. Co.***, 709 N.E.2d 907, 911-12 (Ohio Ct. App. 1998) (noting that "extrinsic evidence" has been submitted demonstrating the insured had expressly rejected equivalent uninsured motorist coverage). Like ***Williams***, in this case, Progressive has come forward with extrinsic evidence that reliably demonstrates an intentional express rejection by Giant Electric to reject UM/UIM limits of $1 million and to expressly select. UM/UIM limits of $100,000. What information is more reliable than an electronic recording of the conversation held between Giant Electric and Progressive? This is not the situation where affidavits are prepared years later by the agent or the carrier regarding the offer. Hence, there is no credibility dispute over what was said and what was accepted/rejected because that can be verified by the electronic recording. Indeed, Palomera-Ruiz does not dispute that the electronic recording of the telephone conversation indicates

that Giant Electric unequivocally rejected $1 million UM/UIM limits and selected lower limits. Instead, Palomera-Ruiz rests solely upon the *pro forma* argument that there was no written notice. This *pro forma* requirement has been soundly rejected by Congress and the Arizona legislature.

The undisputed evidence indicated that, during the conversation, Thompson, the President/CEO of Giant Electric, was informed by Progressive that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. The undisputed evidence indicated that, during the conversation, Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. The undisputed evidence indicated that, during the conversation, Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. In response, Mr. Thompson chose $100,000 of UM/UIM coverage. Thereafter, Progressive issued a commercial auto policy to Giant Electric for the policy term of January 5, 2001 through January 1, 2002, with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. The policy was renewed six (6) successive times with the same UM/UIM coverage limits.

Clearly, the UM/UIM offer made by Progressive satisfied the minimal requirements under the statute. *See*, *e.g.*, ***Ash***, 181 Ariz. at 174-75, 888 P.2d at 1361-62. Progressive, in essence, "offer[ed] such coverage in a way reasonably calculated to bring to the insured's attention that which is being offered."

Giley v. Liberty Mut. Fire Ins. Co., 168 Ariz. 306, 812 P.2d 1124 (Ct. App. 1991); *see also* ***Tallent***, 185 Ariz. at 267, 915 P.2d at 666. The electronic recording of the UM/UIM offer satisfied the purpose of ARS. § 20-259.01 and should be given legal effect. Consequently, Progressive is entitled to summary judgment in its favor, holding that the policy provides UM/UIM limits of $100,000 per claim and $300,000 in the aggregate.

CONCLUSION

The trial court erred in granting Palomera-Ruiz's Motion for Summary Judgment and denying Progressive's Cross Motion for Summary Judgment. This Court should conduct *de novo* review of the UIM statute and interpret it flexibly in light anew technologies and new business models in the insurance industry, such as the Internet and direct writers who conduct phone transactions. In order to facilitate these new developments, Congress and the Arizona legislature passed E-SIGN and AETA, respectively, giving legal effect to electronic records such as the recorded phone call in this case. The trial court erred in failing to acknowledge that E-SIGN and AETA preempt Arizona's UIM statute to the extent the UIM statute would invalidate an electronic offer of coverage.

E-SIGN and AETA clearly apply to the recorded phone call. Giant Electric and Progressive both

consented to do business electronically. A paper form of consent is cumbersome, unnecessary, and contrary to the purposes of these statutes, which are designed to facilitate paperless transactions. Furthermore, Progressive was not required to provide Giant Electric with a retainable paper copy of the electronic offer. That too would be contrary to the spirit and letter of E-SIGN and AETA. This Court should review E-SIGN and AETA *de novo* and reverse the trial court.

The recorded phone call fulfilled the legislative intent of the UIM statute. The purpose of the written offer requirement is simply to ensure that the offer is made. Under ***Tallent***, 185 Ariz. at 267, 915 P.2d at 666, Progressive was not required to explain UIM coverage to Giant Electric, although it did so anyway.

Finally, the trial court incorrectly relied on ***Ball***, 181 Ariz. at 124, 888 P.2d at 1311. The ***Ball*** court reasoned that a writing is the only way to ensure credibility. That is not the case here, where the content of the recorded phone call is undisputed. Furthermore, ***Ball*** pre-dated the passage of E-SIGN and AETA. Congress and the Arizona legislature have now specified that a recorded phone call is equivalent to a writing. Therefore, ***Ball*** is not controlling and is not dispositive.

For the foregoing reasons, the trial court's decision should be reversed, and Progressive is entitled to summary judgment.

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
)ss.
County of Maricopa)

I, JOHN WITTWER, being first duly sworn upon his oath, deposes and says:

That he has made service of the foregoing Opening Brief of Appellants and Appendix in support thereof by filing the original and six (6) copies with:

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and by causing to be mailed this day two (2) copies to:

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SUBSCRIBED AND SWORN to before me this ___ day of February, 2009.

/s/ C D Knutson
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[SEAL]	Notary Public State of Arizona Maricopa County C D Knutson My Commission Expires 03/22/2010

My Commission Expires:
03-22-2010

CERTIFICATE OF COMPLIANCE

STATE OF ARIZONA)
)ss.
County of Maricopa)

JOHN WITTWER, being first duly sworn upon his oath, deposes and says:

1. The accompanying Opening Brief has double line spacing and uses proportionately spaced typeface of Times New Roman, 14 point size, and 10,550 total word count.

/s/ John Wittwer
JOHN WITTWER

SUBSCRIBED AND SWORN to before me this ___ day of February, 2009.

/s/ C D Knutson
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My Commission Expires:
03-22-2010

IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION ONE

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio Corporation, Plaintiff-Appellant, vs. ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; GIANT ELECTRIC CORPORATION, an Arizona corporation, Defendant-Appellee.	No. 1 CA-CV 09-0065 Maricopa County Superior Court NO. CV2007-012049

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

ARGUMENT 1

I. PROGRESSIVE COMPLIED WITH THE UM/UIM STATUTE 1

A. Progressive Satisfied the Letter of the UM/UIM Statute 1

B. Progressive Satisfied the Intent of the UM/UIM Statute and the *Ball* Decision 2

C. The Trial Court Erroneously Concluded that the UM/UIM Statute Must be Amended Before Electronic Contracts Will be Enforceable 3

II. THE TRIAL COURT ERRED IN FAILING TO ENFORCE AETA 8

A. The Trial Court's Reasoning Regarding AETA and E-SIGN was Erroneous 8

B. The Court Should Reject Appellee's Purported Distinction Between an "Offer" and a "Record" 9

C. The Court Should Reject Appellee's Invitation to Add a Statutory Requirement that the Insurer Must "Provide, Send, or Deliver" the UIM Offer 10

III. THE TRIAL COURT ERRED IN FAILING TO ENFORCE E-SIGN 12

A. Progressive's Offer of UIM Coverage Was an "Electronic Record" Within the Meaning of E-SIGN 12

B. E-SIGN'S "Consent" Provisions Do Not Apply Here 13

C. Progressive's Position is Consistent with the Public Policy of AETA and E-SIGN 16

CONCLUSION 18

CERTIFICATE OF SERVICE 19

CERTIFICATE OF COMPLIANCE 21

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. CONST. art. VI, cl. 2 7

Statutes

15 U.S.C. § 7001 13

15 U.S.C. § 7001(a)(1) 13

15 U.S.C. § 7001(c) 13, 14, 15

15 U.S.C. § 7001(c)(1)(C)(ii) 14, 16

15 U.S.C. § 7001(c)(6) 13, 14

15 U.S.C. § 7006(2) 9

A.R.S. § 20-259.01 ..... Passim

A.R.S. § 44-7001 *et seq*.....4

A.R.S. § 44-7002(5).....9

A.R.S. § 44-7006.....16

A.R,S. § 44-7006(3).....4

A.R.S. § 44-7007(C).....8

Pub.L. 106-229, June 30, 2000, 114 Stat. 464.....4

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Ball v. American Motorist Ins. Co., 181 Ariz. 124, 888 P.2d 1311 (1995).....2, 3

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).....7

Dalos v. Novaheadinc, 2008 WL 4182996, at *4, ¶¶ 16-17 (App. Div. 1 March 18, 2008).....13

Deer Valley Unified Sch. Dist. No. 97 v. Houser, 214 Ariz. 293, 296, 152 P.3d 490, 493 (1997).....9

Giley v. Liberty Mut. Fire Ins. Co., 168 Ariz. 306, 812 P.2d 1124 (App. 1991).....3

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985).....7

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In re Lavigne, 2007 WL 3469454 (Bkrtcy. E.D. Va. November 14, 2007) 15

Ormsbee v. Allstate Ins. Co., 176 Ariz. 109, 112, 859 P.2d 732, 735 (1993) 2

State Farm Mut. Auto. Ins. Co. v. Ash, 181 Ariz. 167, 173, 888 P.2d 1354, 1360 (App. 1994) 15

St. Paul Fire & Marine Ins. Co. v. Gilmore, 168 Ariz. 159, 165-66, 812 P.2d 977, 983-84 (1991) 2

Tallent v. National General Ins. Co., 185 Ariz. 266, 268, 915 P.2d 665, 667 (1996) 1, 11

Wells Fargo Bank v. Arizona Laborers, 201 Ariz. 474, 782, 38 P.3d 12, 20 (2002) 1

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BLACK'S LAW DICTIONARY (8th ed. 2004) 14

MERRIAM-WEBSTER'S ONLINE DICTIONARY 14

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Ethna M.S. Piazza, *Common Misconceptions Surround Electronic Transactions With Consumers*, 19 No. 5 Intell. Prop. & Tech. L.J. 15, 15 (May 2007) 14

Steven Plitt, Arizona Liability Insurance Law (1998) 3

Restatement (Second) of Contracts § 24 (1981) 11

Uniform Electronic Transactions Act § 2, comment 6 17

ARGUMENT

I. *PROGRESSIVE COMPLIED WITH THE UM/UIM STATUTE.*

A. Progressive Satisfied the Letter of the UM/UIM Statute.

The trial court erred in holding that Progressive did not comply with Arizona's UM/UIM statute, A.R.S. § 20-259.01(B). That statute provides in relevant part (emphasis added):

> Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and *shall by written notice offer* the insured and at the request of the insured shall include within the policy underinsured motorist coverage which extends to and covers all persons insured under the policy, in limits

> not less than the liability limits for bodily injury or death contained within the policy.

Here, it is not disputed that Progressive offered UIM coverage to Giant Electric's President, Mr. Thompson, in an amount equal to Giant Electric's liability insurance limits. Appellee cryptically suggests that the clarity and substance of the UM/UIM offer was somehow lacking. (*See* Appellee's Resp. Br. at 2:18-3:1). Nevertheless, Appellee concedes that the facts must be taken in a light most favorable to Progressive. *See* ***Wells Fargo Bank v. Arizona Laborers,*** 201 Ariz. 474, 482, 38 P.3d 12, 20 (2002). Appellee also admits that the insurer is not required to explain anything about UIM coverage. (*See* Appellee's Resp. Br. at 8:7-11, quoting ***Tallent v. Nat'l Gen. Ins. Co.,*** 185 Ariz. 266, 268, 915 P.2d 665, 667 (1996)). The insurer need only make the offer. Progressive undisputedly did that. To the extent the statute requires a "written" offer, the recorded telephone call satisfied that requirement, as discussed herein.

B. Progressive Satisfied the Intent of the UM/UIM Statute and the *Ball* Decision.

The trial court also failed to recognize that Progressive fulfilled the intent of the UM/UIM statute and the Arizona Supreme Court's decision in ***Ball v. American Motorist Ins. Co.,*** 181 Ariz. 124, 888 P.2d 1311 (1995). In ***Ormsbee v. Allstate Ins. Co.,*** 176 Ariz. 109, 112, 859 P.2d 732, 735 (1993), the Arizona Supreme Court explained that:

> [T]he purpose of the Uninsured Motorist Act is to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others. "The offer of UIM coverage mandated by A.R.S. § 20-259.01(C) [more recently relettered as subsection B] was intended to implement this protection." [***St. Paul Fire & Marine Ins. v. Gilmore***, 168 Ariz. 159, 165-66, 812 P.2d 977, 983-84 (1991)].
>
> * * *
>
> The legislature has acknowledged a very real problem in Arizona. With the presence of so many uninsured or underinsured drivers, the only practical way responsible people can protect themselves from these persons is to have the opportunity to buy uninsured or underinsured motorist coverage.

An oral offer satisfies the foregoing policy objectives, because it gives insureds the opportunity to protect themselves and their loved ones by purchasing higher levels of UIM coverage. The trial court erroneously ruled that only a hardcopy of a printed document on paper can accomplish this purpose. As discussed below, the Arizona Legislature and United States Congress have rejected this outmoded requirement and allow for alternative means, including oral offers that are electronically recorded and stored. Here, it is undisputed that the offer was made. Giant Electric had the opportunity to purchase more coverage, but it declined that offer.

Moreover, a recorded phone call satisfies the intent of the UM/UIM statute and ***Ball***, by avoiding credibility contests.[1] Palomera-Ruiz does not dispute that the recorded phone call is an accurate recordation of the conversation between Progressive's representative and Giant Electric's President, Mr. Thompson. Because Progressive "offer[ed] such coverage in a way reasonably calculated to bring to the insured's attention that which is being offered," Progressive is entitled to judgment in its favor as a matter of law. *See* ***Giley v. Liberty Mut. Fire Ins. Co.***, 168 Ariz. 306, 812 P.2d 1124 (App. 1991).

C. The Trial Court Erroneously Concluded that the UM/UIM Statute Must Be Amended Before Electronic Contracts Will Be Enforceable.

In adopting Appellee's position, the trial court erroneously believed that the insurance industry

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[1] Appellee's discussion of "waiver" of the statutory requirement of a written offer misses the mark. (*See* Appellee's Resp Br at 8-10). Unlike ***Ball***, in this case, no one contends that the "written offer" requirement was waived Instead, Progressive satisfied the requirement in a manner explicitly permitted by AETA and E-SIGN.

Likewise, Appellee's argument regarding statements made in ARIZONA LIABILITY INSURANCE LAW, authored by Progressive's counsel, Steven Plitt, is not persuasive. Mr Plitt's treatise was published in 1998 – two years before AETA and E-SIGN were passed in 2000. Obviously, the treatise could not have addressed those statutes when they were not in existence

should go to the Legislature if it wants to get the UM/UIM statute amended. (RT 4-14-08 at 17:14). That statement misses the point. It is not necessary to go to the Legislature anymore for this issue. The Legislature has already acted by passing the Arizona Electronic Transactions Act ("AETA"), A.R.S. § 44-7001 *et seq.*, which globally amended all statutes that require a "writing". *See* A.R.S. § 44-7006(3) (stating that AETA should be construed and applied to "[e]ffectuate its general purpose to *make uniform the law of this state* with respect to the subject of this chapter for intrastate, interstate and international transactions.") (emphasis added).

Appellee similarly contends that Progressive's position "requires a balancing of trends and interests that constitutes a legislative, not a judicial call." (Appellee's Resp. Br. at 13:17-19). This again misses the mark. The Arizona Legislature and United States Congress made that "call" nearly nine years ago by passing AETA and the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), Pub. L. 106-229, June 30, 2000, 114 Stat. 464, respectively. Nothing remains but for this Court to uphold these statutes.

Appellee incorrectly argues that the amendments to the UM/UIM statute support its position. Appellee did not raise the issue of the statutory amendments in the trial court, nor did the trial court consider or rely on any language in the statutory amendments. (ROA 15, 34, 35). Appellee has waived this argument.

Westin Tucson Hotel v. State Dept of Revenue, 188 Ariz. 360, 364, 936 P.2d 183, 187 (App. 1997).

Nevertheless, those amendments do not answer the questions presented in this appeal. The 2003 amendment to the A.R.S. § 20-259.01 added a sentence stating: "The completion of such form is not required where the insured purchases such coverage in an amount equal to the limits for the bodily injury or death contained in the policy." The phrase "such form" refers to the sample form provided by the Arizona Department of Insurance ("DOI"). It is undisputed that the DOI form is merely an exemplar. Insurers are free to use their own form, or to use no form at all. Indeed, the July 16, 2003 regulatory bulletin cited in Appellee's Response Brief at 17-18 even uses the words "sample form" when referring to the DOI exemplar.

Contrary to Appellee's contention, there is no reason why Progressive's position would render the 2003 amendment to the UM/UIM statute "meaningless". (Appellee's Resp. Br. at 18:14). The 2003 amendment to the UM/UIM statute simply does not address what qualifies as a "written offer". AETA answers the question of what qualifies as "written notice" under A.R.S. § 20-259.01. The 2003 amendment to A.R.S. § 20-259.01 addresses a totally different issue, to wit, the problem of needless paperwork where the insured has already selected UIM coverage in an amount equal to the liability limit. Thus, the purpose of the 2003 amendment is to avoid unnecessarily killing trees. That is the same policy

underlying AETA and E-SIGN. If anything, the 2003 amendment to the UM/UIM statute supports Progressive's position in this case.

Thus, the amendment does not require that insurers *must* utilize written forms. It only provides that should an insurer decide to utilize written forms (as opposed to other allowable means under AETA or E-SIGN), a sample written form is recommended.

The fact that the Legislature retained the "written notice" requirement over a period of years is also irrelevant. The UM/UIM statute does not explain what qualifies as "written notice." That answer is contained in AETA.

Appellee also cites the July 16, 2003 DOI regulatory bulletin, which provides in relevant part: "A.R.S. § 20-259.01 further requires an insurer to provide an applicant with a selection form containing the written notice and offer of the two coverages [UM and UIM]." *See* Ariz. Dept. of Ins. Regulatory Bulletin 2003-10 (July 16, 2003), http://hermes.id.state.az.us/cgi-bin/wa?A2=ind0307c&L=adoi-bulletin-1&T=0&P=77 (last checked 6/25/09). As discussed above, the DOI's sample selection form is purely optional. To the extent, if any, that the DOI's July 16, 2003 regulatory bulletin purports to add a substantive requirement that is contrary to A.R.S. § 20-259.01, AETA, or E-SIGN, the DOI is without authority to do so. Indeed, the same regulatory bulletin admonishes that (emphasis added):

> This Substantive Policy Statement is *advisory only.* A Substantive Policy Statement does not include internal procedural documents that only affect the internal procedures of the Agency, and *does not impose additional requirements or penalties on regulated parties* or include confidential information or *rules made in accordance with the Arizona Administrative Procedure Act.* If you believe that this Substantive Policy Statement does impose additional requirements or penalties on regulated parties you may petition the agency under Arizona Revised Statutes Section 41-1033 for a review of the Statement.

Appellee did not address this regulatory bulletin in the trial court, and the trial court neither considered nor analyzed it when making its ruling. (ROA 15, 34, 35). Consequently, Appellee has waived this argument on appeal. ***Westin Tucson,*** *supra.*

In addition to the foregoing points, it goes without saying that neither the Arizona Legislature nor the DOI has authority to override the federal E-SIGN statute. ***Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.,*** 471 U.S. 707, 712 (1985) ("It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law."); ***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,*** 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are

contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") (citations omitted).

For the foregoing reasons, the Court should reverse the trial court's decision that Progressive did not comply with Arizona's UM/UIM statute.

II. *THE TRIAL COURT ERRED IN FAILING TO ENFORCE AETA.*

A. The Trial Court's Reasoning Regarding AETA and E-SIGN Was Erroneous.

The trial court reasoned in part that a recorded phone call does not satisfy A.R.S. § 20-259.01 because "telephones were invented at the time the [UM/UIM] statute was passed." (RT 4-14-08 (oral argument) at 17:14). The important point is not that telephones existed at the time the UM/UIM statute was passed, but that *AETA and E-SIGN did not exist until 2000.*

As discussed in Progressive's Opening Brief at pages 28-31, AETA provides that a recorded phone call satisfies "any law" that requires a record be in writing. A.R.S. § 44-7007(C). Appellee's position that "[a]n oral offer is not a written offer" simply ignores the plain language of AETA and E-SIGN. (*See* Appellee's Resp. Br. at 5:8). The parties agree that "[w]hen analyzing statutes, we apply 'fundamental principles of statutory construction, the cornerstone of which is the rule that the best and most reliable index of a

statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." ***Backus v. State***, 220 Ariz. 101, ¶ 11, 203 P.3d 499, 502 (Ariz. March 19, 2009) (quoting ***Deer Valley Unified Sch. Dist. No. 97 v. Houser***, 214 Ariz. 293, 296, 152 P.3d 490, 493 (1997)). The trial court erred because it was unwilling to apply the foregoing canon of statutory construction to AETA and E-SIGN.

Here, AETA's language is clear and unequivocal: "'Electronic' means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities." A.R.S. § 44-7002(5). E-SIGN provides that "[t]he term 'electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." 15 U.S.C § 7006(2). It is hard to imagine a broader definition. The recorded phone call at issue in this case clearly qualifies. The trial court erred in holding that it did not.

B. The Court Should Reject Appellee's Purported Distinction Between an "Offer" and a "Record".

Appellee mistakenly contends that "an offer is not a record." (Appellee's Resp. Br. at 14:12).[2] This

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[2] This is another argument that Appellee did not raise in the trial court, nor did the trial court consider or rely on it. (ROA 15, 34, 35). Consequently, Appellee has waived this argument

(Continued on following page)

argument might be more persuasive if both the "offer" and "written notice" elements of A.R.S. § 20-259.01 were under dispute in the present appeal. That is not the case. Progressive undisputedly made the "offer" of higher UIM limits to Giant Electric. The only issue here is whether the "written notice" requirement of A.R.S. § 20-259.01 was satisfied. Fortunately, AETA and E-SIGN readily answer that question in the affirmative.

Appellee goes on to state that "[o]ne may or may not make . . . a record *of* an offer." (Appellee's Resp. Br. at 14:15-16, emphasis in original). Progressive agrees, but this assertion is of no moment. If Mr. Thompson had walked into his insurance agent's office and the agent orally offered UIM coverage, without any recording or other device to satisfy AETA or E-SIGN, then the result would be a "he said-she said" situation, with no way to verify whether the offer was actually made. In that hypothetical, there would be no record of the offer. By contrast, there *is* a record of Progressive's offer to Giant Electric, proven by the recorded phone call. This Court must give legal effect to that recorded offer as required by AETA and E-SIGN. Therefore, this Court should reject Appellee's purported distinction between an "offer" and a "record".

Westin Tucson Hotel v. State Dept of Revenue, 188 Ariz. 360, 364, 936 P 2d 183, 187 (App. 1997)

C. The Court Should Reject Appellee's Invitation to Add a Statutory Requirement that the Insurer Must "Provide, Send, or Deliver" the UIM Offer.

A.R.S. § 20-259.01 requires that the insurer "shall by written notice offer" UIM coverage equal to the insured's liability limits. The operative verb in the statute is "offer", not "provide", "send", or "deliver". Nevertheless, Appellee baldly asserts, and the trial court apparently agreed, that it is "indisputable" that "one cannot . . . convey written notice of an offer to another except by providing, sending or delivering the writing." (Appellee's Resp. Br. at 16:5-7 & n.3).

Appellee does not explain why this conclusion is "indisputable". Indeed, the recorded phone call in this case illustrates that an offer can easily be made without providing, sending, or delivering anything. Fortunately, the Arizona Supreme Court has already defined the word "offer" as used in the UM/UIM statute. "Offer" means "[t]o bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not." ***Tallent***, 185 Ariz. at 267-68; 915 P.2d at 666-67 (citing BLACK'S LAW DICTIONARY 1081 (6th ed. 1990); Joseph M. Perillo, CORBIN ON CONTRACTS § 1.11 (revised ed. 1993) ("An offer is an expression by one party of assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express assent to the same terms."); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) ("An

offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.").

Nowhere in the foregoing definitions do the words "provide, send, or deliver" appear. This Court should apply the Arizona Supreme Court's definition of "offer" and reject Appellee's and the trial court's definition.

III. *THE TRIAL COURT ERRED IN FAILING TO ENFORCE E-SIGN.*

A. Progressive's Offer of UIM Coverage Was an "Electronic Record" Within the Meaning of E-SIGN.

The trial court erred in holding that E-SIGN was inapplicable. In this Court, Appellee disputes the very idea that the contract between Progressive and Giant Electric was in electronic form. Instead, Appellee contends that "the *contract* was an oral one, made over the telephone, a *record* of which was preserved on tape." (Appellee's Resp. Br. at 19:13-14, emphasis in original). This argument is pure sophistry.[3] Under Appellee's interpretation, no oral contract could ever qualify as an electronic record under E-SIGN, even if it is recorded on tape or any other acceptable means

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[3] This argument is also similar to Appellee's misguided contention that an "offer" is not a "record", which was already addressed in Section II B, *supra*

under E-SIGN. That is plainly contrary to the plain language of E-SIGN.

Appellee concedes that the trial court denied enforceability of Progressive's agreement with Giant Electric "solely because the requisite information – an offer – was conveyed only orally and not in writing." (Appellee's Resp. Br. at 19:19-20). In doing so, the trial court squarely violated E-SIGN's mandate that a "contract[ ] or other record relating to [any transaction in or affecting interstate or foreign commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form." 15 U.S.C. § 7001(a)(1). Therefore, this Court should reverse the trial court.

B. E-SIGN's "Consent" Provisions Do Not Apply Here.

The consent provisions contained in 15 U.S.C. § 7001(c) are unavailing to Appellee. First, Progressive and Giant Electric certainly consented to do business electronically. Appellee's bare assertion that Progressive "did not obtain consent" is unsupported by the record. (Appellee's Resp. Br. at 21:5). Progressive extensively addressed the issue of consent in its Opening Brief at pages 32 to 35, so those arguments are not repeated here.[4]

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[4] In addition to complying with E-SIGN, Progressive also fulfilled AETA, including any consent requirements contained therein. *See* ***Dalos v. Novaheadinc***, 2008 WL 4182996, at *4,

(Continued on following page)

Nevertheless, Appellee believes that its "most dispositive[ ]"[5] argument is based upon E-SIGN's consent provisions in 15 U.S.C. § 7001(c), and specifically 15 U.S.C. § 7001(c)(6), which provides in relevant part (emphasis added):

> (6) ORAL COMMUNICATIONS. An oral communication or a recording of an oral communication shall not qualify as an electronic record *for purposes of this subsection* except as otherwise provided by law.

Appellee's position is vague, but it appears to interpret the words "this subsection" to mean all of 15 U.S.C. § 7001. However, the correct interpretation of "this subsection" refers only to subsection (c) of § 7001, thereby eliminating E-SIGN's consent requirements in the specific case of oral communications.

Appellee's interpretation is incorrect by the unambiguous terms of the statute. Section 7001 is plainly a "section", not a "subsection".[6] Congress

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¶¶ 16-17 (App. Div 1 March 18, 2008) (holding that email acknowledgement satisfied AETA, and rejecting sender's argument that he did not consent to conduct transactions electronically) A copy of ***Dalos*** is attached hereto as Exhibit 1. Progressive requests that this Court issue a published opinion in order to clarify the law on these issues

[5] *See* Appellee's Resp Br at 21 7

[6] "Section" means "A distinct part or division of a writing, esp a legal instrument. – Abbr. §; sec " BLACKS LAW DICTIONARY (8th ed 2004). "Subsection" means "a subdivision or a subordinate division of a section." *See* MERRIAM-WEBSTER'S ONLINE

(Continued on following page)

would not have added the words "this subsection" if it intended as broad an application as Appellee advocates. The only possible meaning of "this subsection" is subsection (c) of § 7001. E-SIGN's consent provisions are contained in subsection (c). Therefore, pursuant to § 7001(c)(6), the consent requirements do not apply to oral communications. Because Appellee's interpretation of subsection (c)(6) is contrary to the plain words of the statute, this Court should reject it.

Furthermore, Appellee's discussion of 15 U.S.C. § 7001(c)(1)(C)(ii) is incomplete and inaccurate. 15 U.S.C. § 7001(c) applies only to "consumer disclosures." A consumer disclosure is information about a transaction that is required by statute to be disclosed to a consumer; for example, disclosures required by the Truth-In-Lending Act. Ethna M.S. Piazza, *Common Misconceptions Surround Electronic Transactions With Consumers,* 19 NO. 5 INTELL. PROP. & TECH. L.J. 15, 15 (May 2007). *See also* ***In re Lavigne,*** 2007 WL 3469454 (Bkrtcy. E.D. Va. November 14, 2007) (holding that Federal Truth in Lending Act, 15 U.S.C.A. §§ 1601 *et seq.,* is a consumer disclosure statute because it requires, among other things, that the amount of negative equity be disclosed as a component of the purchase price). Other examples of consumer disclosures are: (1) the consumer reporting agency's file that is revealed to the consumer as

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DICTIONARY at http://www merriam-webster com/dictionary/subsection (last checked 6/26/09)

contemplated by 15 U.S.C. § 1681g, ***Johnson v. Equifax, Inc.***, 510 F. Supp. 2d 638, 645 (S.D. Ala. 2007), and (2) Rule 10b-16 of the Securities Exchange Act of 1934 requiring the disclosure of, among other things, the annual rate of interest, ***Baden v. Craig-Hallum, Inc.***, 646 F. Supp. 483, 488 (D. Minn. 1986) (Rule 10b-16 is a consumer disclosure provision to protect investors). 15 U.S.C. § 7001(c) is inapplicable because Arizona's UM/UIM statute, A.R.S. § 20-259.01, is not a disclosure statute. It merely requires that an offer of UM/UIM coverage be made. ***State Farm v. Ash***, 181 Ariz. 167, 173, 888 P.2d 1354, 1360 (App. 1994) ("The insurer need only make the written offer.").

Moreover, even if 15 U.S.C. § 7001(c) is applicable (and it is not), E-SIGN allows for the consumer to consent electronically or confirm consent electronically "in a manner that reasonably demonstrates that the consumer can access the information in the electronic form that will be used to provide the information." 15 U.S.C. § 7001(c)(1)(C)(ii). As discussed in Progressive's Opening Brief at pages 32-35, Giant Electric *did* consent to do business electronically. Its actions in doing so "reasonably demonstrate[d] that [it could] access the information" in telephonic form, which was the same "electronic form" that was used to "provide the information". *See* 15 U.S.C. § 7001(c)(1)(C)(ii).

Even assuming, *arguendo*, that E-SIGN does not apply, AETA provides an independent and adequate

basis why Progressive is entitled to judgment in its favor.

C. Progressive's Position Is Consistent with the Public Policy of AETA and E-SIGN.

Progressive's Opening Brief included an overview of the changes in the business and technological landscape that prompted the passage of AETA and E-SIGN. (*See* Opening Br. at 10-17). Congress concluded that the growth of e-commerce in the private sector is in the national interest and that e-commerce "is a significant driving force behind our nation's robust and expanding economy." 145 Cong. Rec. S14,881 to S14,882 (daily ed. Nov. 19, 1999). Similarly, the Arizona Legislature passed AETA in order to [f]acilitate electronic transactions" and promote "continued expansion of those practices." A.R.S. § 44-7006. As the comments to UETA (the uniform code upon which AETA was based) state, "information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act." UETA § 2, comment 6.

The recorded phone call in this case is a prime example of what Congress and the Arizona Legislature wanted to promote. There is no benefit in forcing an insurance company to jump through the unnecessary hoop of providing a paper copy of the UIM offer

to its insured. The trial court erroneously elevated form over substance by requiring Progressive to do so. The trial court thereby thwarted the public policy upon which AETA and E-SIGN are based.

The UM/UIM statute must be interpreted flexibly. Appellee mistakenly contends that Progressive's position would result in "delet[ing] the written offer requirement from the [UM/UIM] statute." (Appellee's Resp. Br. at 6:13-14). That is incorrect. Progressive merely advocates an interpretation of the UM/UIM statute that also gives effect to the letter and intent of the subsequent statutes, AETA and E-SIGN.

For the foregoing reasons, Progressive is entitled to judgment as a matter of law in its favor, holding that the policy provides UM/UIM limits of $100,000 per claim and $300,000 in the aggregate.

CONCLUSION

Appellee's position would require this Court to ignore the plain language of AETA and E-SIGN, rewrite those statutes to mean the exact opposite of what they say, and substitute the Court's judgment for that of the Arizona Legislature and United States Congress, respectively. This Court is not free to do that. Therefore, the Court should exercise its *de novo* review and reverse the trial court.

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, JOHN WITTWER, being first duly sworn upon his oath, deposes and says:

That he has made service of the foregoing Reply Brief of Appellants by filing the original and seven (7) copies with:

Clerk, Arizona Court of Appeals
Division One
1501 West Washington, Room 203
Phoenix, AZ 85007-3329

and by causing to be mailed this day two (2) copies to:

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DATED this 30th day of June, 2009.

/s/ John Wittwer
JOHN WITTWER

SUBSCRIBED AND SWORN to before me this 30th day of June, 2009.

/s/ C. D. Knutson
NOTARY PUBLIC

My Commission Expires:

03-22-2010

[SEAL] Notary Public State of Arizona
Maricopa County
C D Knutson
My Commission Expires
03/22/2010

CERTIFICATE OF COMPLIANCE

STATE OF ARIZONA)
) ss:
County of Maricopa)

JOHN WITTWER, being first duly sworn upon his oath, deposes and says:

1. The accompanying Reply Brief has double line spacing and uses proportionately spaced typeface of Times New Roman, 14 point size, and 4114 total word count.

/s/ John Wittwer
JOHN WITTWER

SUBSCRIBED AND SWORN to before me this 30th day of June, 2009.

/s/ C. D. Knutson
NOTARY PUBLIC

My Commission Expires:

03-22-2010

[SEAL] Notary Public State of Arizona
Maricopa County
C D Knutson
My Commission Expires
03/22/2010

EXHIBIT 1

2008 WL 4182996 (Ariz.App. Div. 1)

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. *See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R.Crim. P. 31.24.

Court of Appeals of Arizona,
Division 1, Department D.
James E. DALOS,
Plaintiff-Appellee,
v.
NOVAHEADINC., a Colorado corporation,
Defendant-Appellant.
No. 1 CA-CV 07-0459.

March 18, 2008.

Appeal from the Superior Court in Maricopa County; Cause No. CV 2006-050420; The Honorable Paul A. Katz, Judge. AFFIRMED.

Ramras Law offices, P.C. by David M. Ramras, Ari Ramras, Phoenix, Attorneys for Plaintiff-Appellee.

Collins, May, Potenza, Barab & Gillespie, P.C. by Philip G. May, Paula A. Williams, Phoenix, attorneys for Defendant-Appellant.

MEMORANDUM DECISION

WEISBERG, Judge.

¶ 1 Novaheadinc appeals from the superior court's grant of summary judgment to James E. Dalos and the court's award of $699,734.70 for unpaid wages and treble damages under Arizona Revised Statutes ("A.R.S.") section 23-355 (1995). We find no genuine dispute of material fact or error of law and thus affirm the judgment.

BACKGROUND

¶ 2 Dalos entered into a written employment contract with Novaheadinc, a software development company, on April 1, 2003. Novaheadinc prepared the agreement which provided that Dalos would receive "a base salary amount of $120,000 per year as compensation for his services . . . in equal bi-weekly installments." The agreement also stated that Dalos would devote full time to the company, was silent on vacation time, and stated that it contained the parties' entire understanding and could not be amended, modified or supplemented without both parties' written agreement.

¶ 3 Despite the promised salary, Dalos' actual compensation in 2003 was $23,300, in 2004 was $44,500, and in 2005 was $27,000. He spent August and September 2005 at his cabin in Minnesota. Novaheadinc's Chairman and Chief Executive Officer Tom Sweeney acknowledged during his deposition

that Dalos had sought full payment of his salary on more than ten occasions. Sweeney also said that he told Dalos he would be paid in full when the company had "sufficient funds." The parties dispute the precise date on which the employment relationship ended, but Dalos claimed wages until November 15, 2005.

¶ 5 In February 2006, Dalos sued the company for unpaid wages. The parties filed cross-motions for summary judgment. After briefing and argument, the court granted Dalos' motion and denied Novaheadinc's motion. In the judgment, filed on March 8, 2007, the court also awarded Dalos treble damages and attorney's fees. After unsuccessfully moving for a new trial, Novaheadinc timely appealed.

DISCUSSION

Statute Of Limitations

¶ 6 A trial court properly grants summary judgment when "no genuine issue as to any material fact [exists] and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). On appeal, we determine *de novo* whether any genuine factual disputes exist and whether the superior court correctly applied the substantive law. *Eller Media Co. v. City of Tucson,* 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App.2000). The application of statutes presents a question of law for our *de novo* review. *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.,* 178 Ariz. 425, 427, 874 P.2d 982, 984 (App.1994).

¶ 7 A one-year statute of limitations applies to a claim for breach of an employment contract. A.R.S. § 12-541(3) (2003); *see also* A.R.S. § 23-1501(3)(a) (2001) (remedies for breach of an employment contract are limited to those for breach of contract). Dalos filed suit on February 1, 2006, and Novaheadinc accordingly argues that he is precluded from claiming any unpaid wages earned prior to February 1, 2005. Dalos responds, however, that § 12-508 (2003) applies and tolled the statute of limitations.

¶ 8 The statute provides that

> [w]hen an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the action out of the operation of the law, unless the acknowledgment is in writing and signed by the party to be charged thereby.

If documentary evidence offered as acknowledgment of a claim is not conflicting, its sufficiency to toll the statute is a matter of law for the court. *Steinfeld v. Marteny,* 40 Ariz. 116, 125, 10 P.2d 367, 370 (1932).

¶ 9 To be effective, an acknowledgment must sufficiently identify the obligation, state an express or implied promise to pay, and contain a direct or implied expression of the "justness" of the debt." *Freeman v. Wilson,* 107 Ariz. 271, 275-76, 485 P.2d 1161, 1165-66 (1971). An acknowledgement, however, need not specify the exact amount or nature of the debt. *Id.* at 275, 485 P.2d at 1165. The rationale is that "a court

should not and will not go out of its way to give its benefit to a man who seeks to take advantage of the leniency of his creditor to defeat the collection of a just debt which he admits has never been paid." *Wooster v. Scorse,* 16 Ariz. 11, 16, 140 P. 819, 821 (1914).

¶ 10 For example, in *Bainum v. Roundy,* 21 Ariz.App. 534, 534-35, 521 P.2d 633, 633-34 (1974), the debtor wrote to the creditor: "I am sure we can *reach an understanding* in a satisfactory arrangement for the repayment of my note with you." (Emphasis added.) From these words, we held that the debtor "treated the indebtedness as subsisting, expressed a willingness to pay it, and felt a moral obligation to pay [it]." *Id.* at 535, 521 P.2d at 634. The emphasized words did not undercut the debtor's willingness to repay the debt but simply indicated that the terms would have to be worked out. *Id.*

¶ 11 Dalos cites the following e-mail exchange with Sweeney on November 1, 2005 as evidence of Sweeney's promise to pay a just debt. Dalos wrote:

> Tom, On April 1, 2003, you and I signed an employment agreement where I was to be compensated $120,000 annually paid in bi-weekly installments. This equates to $5,000 bi-weekly. The compensation actually paid me has not met this commitment on any pay period. Attached is a spreadsheet indicating the payroll amounts paid to me per pay period and accumulated payroll amounts due. I have forwarded this spreadsheet to Steve

> Antol for verification of the total amount due me to date, which at a minimum amounts to over $215,000. We need to meet to discuss regular accelerated payments to extinguish this large amount due me. I would like to schedule a time for an interrupted [sic] meeting so that we can have a frank discussion of our plans. If you need to contact me outside the office to set up the meeting, use my cell number [redacted].
>
> Sweeney responded:
>
> Jim, I meet with Steve Antol tomorrow and we will discuss monies owed you. After that let's sit down and discuss payments and plans going forward. We should be able to do this Thursday or Friday. Take care!

Sweeney does not deny sending this response, and from the language used, he acknowledged that Novaheadinc owed monies to Dalos and implied that that the debt was just and payment would be made. Thus, the message supports the trial court's finding that the statute of limitations did not bar Dalos' claim.

¶ 12 Novaheadinc nevertheless argues that a promise to pay must be unequivocal and that Sweeney's promise failed to specify the amount of indebtedness. It cites *John W. Masury & Son v. Bisbee Lumber Co.*, 49 Ariz. 443, 68 P.2d 679 (1937). But, by contrast with the above exchange, in Masury the debtor wrote to the creditor that "it was left with a broken line of merchandise," the goods were not worth what it had

agreed to pay, and it refused to pay the full amount. *Id.* at 476, 68 P.2d at 693. The debtor clearly denied the justness of the debt and did not promise to pay it; in fact, the debtor's final letter offered either to pay 25% less than the debt or to return the merchandise. *Id.* at 476-77, 68 P.2d 679, 68 P.2d at 693-94.

¶ 13 Although *Masury* involved a single debt, the court noted that in *Steinfeld* the court had held that if several debts exist and the acknowledgment fails to identify a particular one, the acknowledgement is insufficient. *Id.* at 474, 10 P.2d 367, 68 P.2d at 692. In *Steinfeld,* a loan company owned seven different promissory notes made by the debtor. 40 Ariz. at 122, 10 P.2d at 369. The debtor had written several letters asking "for leniency" and expressing hope that he would be able to reduce or pay off his debts, but none of the letters identified a specific note. *Id.*

¶ 14 In our case, there is a single debt. And as *Masury* made clear, an acknowledgment need not "specifically set up the exact distinctly and unerringly to a specific *obligation.*" 49 Ariz. at 474, 68 P.2d at 692 (emphasis added). Similarly, in *PNL Asset Management Co., L.L.C. v. Brendgen & Taylor Partnership,* 193 Ariz. 126, 131, ¶ 22, 970 P.2d 958, 963 (App.1998), we held that "[t]he fact that the amount is not specified is of no consequence where the amount can easily be ascertained once the debt is identified." Sweeney's e-mail does not reveal any confusion as to the obligation being discussed, and omission of a dollar amount is not fatal.

¶ 15 We also are not persuaded by Novaheadinc's alternative contention that the acknowledgment was not signed by the party to be charged because no handwritten signature appears on the e-mail. Sweeney was the CEO and admitted that he sent the e-mail. A document is "signed" when a person employs "any of the known modes of impressing a name on paper" including "writing, printing, lithographing, or other such mode." *Bishop v. Norell,* 88 Ariz. 148, 151, 353 P.2d 1022, 1025 (1960); *see also State v. McIntosh,* 213 Ariz. 579, 146 P.3d 80 (App.2006) (adopting the definition of "sign" as "to identify (a record) by means of a signature, mark, or other symbol with the intent to authenticate it as an act . . . of the person identifying it"); Restatement (Second) of Contracts § 134 (1979) (*defining* a "signature" as "any symbol made or adopted with an intention . . . to authenticate the writing as that of the signer."). By sending the e-mail with the heading "From Tom Sweeney," Sweeney impressed his name on the message with the intent of identifying and authenticating it.

¶ 16 In addition, Novaheadinc's contention is inconsistent with the Uniform Electronic Transactions Act ("UETA"), codified at A.R.S. §§ 44-7001 to -7051 (2003 & Supp.2007). At least one court has held that an e-mail header displaying the sender's name meets the Uniform Commercial Code definition of "signed," i.e. "any symbol executed or adopted by a party with present intention to authenticate a writing." *Int'l Casings Group, Inc. v. Premium Standard Farms,*

Inc., 358 F.Supp.2d 863, 872-73 (W.D.Mo.2005). By hitting the "send" button, the author authenticates an e-mail message as his or her own writing. *Id.* The same logic holds here.

¶ 17 Novaheadinc counters that UETA only applies when the parties agree to conduct transactions electronically. However, the Act provides in relevant part: "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." A.R.S. § 44-7005(B). A comment to UETA explains that "to facilitate electronic transactions, [the Act] must be applicable under circumstances not rising to a full fledged contract to use electronics . . . [and] to require an explicit contract would itself be an unreasonable barrier to electronic commerce, at odds with the [Act's] fundamental purpose." UETA § 5 cmt. 3. A person may be deemed to have consented to electronic communications by on-going participation in such communications, *Int'l Casings,* 358 F.Supp.2d at 875, or by primary use of that medium. *Crestwood Shops, L.L.C. v. Hilkene,* 197 S.W.3d 641, 653 (Mo.Ct.App.2006). In this case it particularly would be anomalous to suggest that Sweeney and Dalos, employees of a software company, did not consent to using e-mail. Accordingly, we conclude that Sweeney's acknowledgement satisified A.R.S. § 12-508 and thus that the one-year statute of limitations did not cut off Dalos' claim for wages prior to February 1, 2005.

¶ 18 Moreover, we also conclude that Novaheadinc is estopped from raising the statute of limitations

defense. In *Certainteed Corp. v. United Pacific Insurance Co.,* 158 Ariz. 273, 277-78, 762 P.2d 560, 564-65 (App.1988), the defendant was estopped from raising the statute of limitations because, although it had acknowledged much of the asserted debt, it waited until after the limitations period had run to refuse to pay that debt, and we affirmed summary judgment. *Id.* at 278, 762 P.2d at 565. Here, Sweeney admitted talking with Dalos about the need "to arrive at a satisfactory conclusion . . . without litigation" and after Dalos' termination, Sweeney informed him that Novaheadinc was expecting large sums of money, leading Dalos to reasonably believe that he would be paid. This evidence supports a finding of estoppel.

Evidence of Unpaid Wages

The Amount Claimed

¶ 19 In very limited circumstances, an employer may decline to pay an employee. By law, an employer may withhold wages if "required or empowered to do so by state or federal law," if "[t]he employer has [the employee's] prior written authorization . . . [or if][t]here is a reasonable good faith dispute as to the amount of wages due. . . ." A.R.S. § 23-352 (1995). Moreover, employers must designate two or more days a month, not more than sixteen days apart, as fixed days for the payment of "all wages due . . . up to

such date."[1] A.R.S. § 23-351(A), (C) (1999). An employer who discharges an employee must pay the "wages due him within three working days or the end of the next regular pay period, whichever is sooner;" and an employer must pay an employee who has quit "no later than the regular payday for the pay period in which the termination occurred." A.R.S. § 23-353(A),(B) (1995). A violation of these sections is a petty offense. A.R.S. §§ 23-351(F); 23-353(D).

¶ 20 Novaheadinc does not deny that it failed to pay Dalos the full $120,000 in annual salary due him over the course of his employment but asserts that factual questions exist because Dalos claimed differing amounts. We concluded, however, that no trial was needed to resolve the amount due.

¶ 21 Dalos' initial estimates of "over $215,000" in unpaid wages and of $226,544 had been presented to Novaheadinc for its confirmation prior to the initiation of litigation. However, the spreadsheet provided by Dalos in support of his motion for summary judgment supported the trial court's use of $233,244.90 as the amount due. The spreadsheet showed $227,140 in

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[1] Section 23-350(5) defines "wages" as "nondiscretionary compensation due an employee in return for labor or services rendered," and wages include such things as vacation and severance pay, "bonuses, and other amounts promised when the employer has a policy or practice of paying such compensation." *Id.* The statute applies to compensation already earned under an employment contract. *See Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 642 (9th Cir 1984) (emphasizing that the treble damages applies to wages not paid for work performed)

unpaid wages and $6,104.90 in medical expenses, which Novaheadinc admitted were part of Dalos' compensation; together these total $233,244.90.

¶ 22 Furthermore, Novaheadinc did not submit an affidavit controverting the $233,244.90 amount Dalos claimed. When Dalos' counsel showed Sweeney the damages calculation during deposition, Sweeney said that he had no reason to dispute it. Consequently, the trial court could accept the spreadsheet as accurate. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶¶ 14-15, 17 P.3d 790, 793 (App.2000) (party's accounting to support amount of claim shifts burden to opposing party to show fact question existed on accuracy of amount; no factual dispute existed absent evidence showing error in moving party's records); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App.1990) (if opponent of summary judgment fails to present facts to controvert moving party's affidavits, moving party's facts may be accepted as true).

B. Vacation Pay

¶ 23 Novaheadinc next argues that Dalos is not entitled to payment for August and September 2005 because he was on vacation. Dalos counters that the agreement did not preclude him from taking a vacation and that its terms must be construed against the drafting party.

¶ 24 Dalos' work consisted primarily of internet research, and the record shows that Novaheadinc had

no other work for Dalos to do during those months but that he remained available for work. Dalos testified that in July, "no payments were being made. I thought . . . I can do basically from up north what I'm doing in the office here, which basically is when Tom needs something researched, I go to the Web and I search." In addition, Dalos said that he "was in contact with [Tom] weekly. Is there anything you need me to follow up or chase? He would say no, same old story. We are chasing a lot of bunnies and just waiting for things to happen."

¶ 25 We also note that Novaheadinc's motion did not allege that Dalos had quit working for the company in August or September, nor did it submit any affidavits or other evidence that Dalos had taken an unauthorized leave. Furthermore, when asked whether Dalos had failed to perform any of his obligations, Sweeney said that he had not, undermining a suggestion that Dalos' absence was unauthorized.

¶ 26 Therefore, the undisputed facts require the conclusion that Dalos was not on an unauthorized vacation, and no trial was necessary on that issue. Dalos was entitled to wages for August and September 2005.

C. Termination Date

¶ 27 Novaheadinc additionally contends that a trial is necessary to resolve when Dalos terminated his employment; it claims that Dalos' termination date was mid-October 2005, citing Sweeney's deposition.

However, Sweeney's deposition testimony fails to support the mid-October date. Sweeney said that he had met with Dalos in his office in the middle of October 2005 and that he had assured Dalos that he had not authorized anyone to make changes to his office. The October conversation also covered "compensation and schedules and what's ahead." In addition, Sweeney testified that he had no reason to believe that Dalos's calculation of the amounts due was inaccurate. That calculation included wages due through November 14, 2005. Therefore, Sweeney's own testimony contradicts the assertion that Dalos stopped working in mid-October.

¶ 28 Novaheadinc provided no documentary evidence of Dalos' termination but claimed it could not recover data showing when Dalos stopped logging in and out of its network. A self-serving and unsupported statement is insufficient to defeat summary judgment. *See Florez v. Sargeant,* 185 Ariz. 521, 526-27, 917 P.2d 250, 255-56 (1996) (self-serving assertions not supported by the record will not defeat motion for summary judgment).

¶ 29 Furthermore, Sweeney's own e-mail of November 1 belies an October termination. Sweeney's email said that he would "meet with Steve Antol tomorrow and we will discuss monies owed you. After that let's sit down and discuss payments and plans going forward." Nothing in this message suggests that Dalos had been terminated in mid-October. To the contrary, Dalos provided a letter of November 23, 2005 in which he had informed Sweeney: "Last week

I . . . [found] my personal items removed, research material thrown in the trash, and my network access revoked. I can only surmise that you have decided to terminate my employment with Novahead."

¶ 30 Finally, even if Novaheadinc had terminated Dalos in mid-October, it produced no evidence that it had complied with the agreement's notice procedures.[2] The agreement stated:

> Any notice given hereunder shall be in writing and delivered or mailed by registered or certified mail, return receipt requested:
>
> a. To the Company, . . .
>
> b. To Employee . . .
>
> Either party may, by notice as provided above, designate a different address. Any such notice shall be effective on the date of receipt.

Dalos complied with the notice provision on November 23, 2005 when he sent by certified mail the above-described letter stating his surmise that he had been terminated. Dalos claimed payments only through November 14, 2005, and the trial court properly granted judgment for that time period.

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[2] Although the trial court did not discuss the notice provision, we may affirm the grant of summary judgment "if its decision is supportable on any grounds." *Lopez v. Cole*, 214 Ariz. 536, 537, ¶ 6, 155 P.3d 1060, 1061 (App.2007).

Propriety of Treble Damages

¶ 31 Novaheadinc further contends that the trial court erroneously imposed the treble damage sanction under A.R.S. § 23-355 (1995). The statute provides:

> If an employer, in violation of the provisions of this chapter, shall fail to pay wages due any employee, such employee may recover in a civil action against an employer or former employer an amount which is treble the amount of the unpaid wages.

Novaheadinc insists that it falls within the provision in § 23-352 that permits withholding wages if "[t]here is a reasonable good faith dispute as to the amount of wages due."

¶ 32 We review the trial court's decision to apply the treble damages penalty for abuse of discretion. *Sanborn,* 178 Ariz. at 427, 874 P.2d at 984. We review findings regarding the employer's reasonableness and good faith in refusing to pay for work performed under a substantial evidence standard. *Ouine v. Godwin,* 132 Ariz. 409, 413, 646 P.2d 294, 298 (App.1982) (substantial evidence supported finding of employer's bad faith).

¶ 33 In *Sanborn,* for example, we upheld a treble damages award because the employer conceded that its records showed that the employee was entitled to at least a portion of the claimed wages. 178 Ariz. at 428, 874 P.2d at 985. We held that the employer's refusal to pay constituted bad faith. *Id.* Here,

Sweeney repeatedly acknowledged that Dalos was owed wages but claimed that the company lacked the funds to pay. As in *Sanborn,* its refusal to pay constituted bad faith. *See id.*[3]

¶ 34 Novaheadinc insists, however, that it acted in good faith and cites *Crum v. Maricopa County,* 190 Ariz. 512, 950 P.2d 171 (App.1997). In *Crum,* the employer paid the employee his final salary and simultaneously prepared a check for accrued vacation and sick leave but through oversight failed to mail the check. *Id.* at 513, 950 P.2d at 172. The next day,

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[3] Novaheadinc also argues that Dalos orally consented to withholding of wages Sweeney's affidavit stated that he had told Dalos that Novaheadinc could not pay him until its product was marketed, that Dalos had acknowledged that he would not receive wages in accord with the agreement until sufficient revenue existed, and that Dalos was paid "consistent with our discussions and understanding." Section 23-352(2), however, requires written authorization from an employee for the withholding of wages

Moreover, the parol evidence rule precludes admission of such statements. *Taylor v State Farm Mut Auto Ins Co* , 175 Ariz 148, 854 P.2d 1134 (1993). The trial court considers the contract's language and whether the interpretation proferred is reasonable; if so, it may admit parole evidence to aid in determining the parties' intent *Id* at 154, 854 P.2d at 1140. But *Taylor* does not authorize use of extrinsic evidence to vary or contradict an agreement *Id.* at 152, 854 P.2d 1134, 854 P.2d at 1138

Admission of parol evidence that Dalos consented to delayed payment would violate this rule. The contract required that Dalos would be paid $120,000 on a bi-weekly basis. Evidence that he would accept delayed payment contradicts the contract, and the trial court could not admit such evidence

the employee demanded payment, *id.*, and the employer found and promptly mailed the check. *Id.* at 514, 950 P.2d at 173. We held that this "brief, good faith, inadvertent oversight immediately corrected upon notice" could not sustain a treble damages award. *Id.* at 516, 950 P.2d at 175.

¶ 35 But no brief or inadvertent oversight occurred here. Novaheadinc made a calculated decision not to pay Dalos his full compensation, and Sweeney admitted that Novaheadinc withheld wages because it was "prerevenue." Even if the company did lack revenue, the statutes do not excuse failure to pay on this basis. As the treble damages and criminal penalties demonstrate, an employer violates the wage statutes at its peril.

¶ 36 The company also relies upon *Cummings v. Aviation Specialties Trade Corp.*, 120 Ariz. 536, 587 P.2d 255 (App.1978), but it is not analogous. The employer there appealed from the award of additional compensation to the employees, *id.* at 536, 587 P.2d 255, 587 P.2d at 255, after the trial court found the employment contact ambiguous and admitted parole evidence. *Id.* at 538-39, 587 P.2d at 257-58. No dispute over ambiguous contract terms exist here, however; rather, Novaheadinc was fully aware that it was not paying Dalos as it had agreed to do in the employment contract.

¶ 37 Good faith is a question of fact, but when the key facts are undisputed, a factual issue may be resolved as a matter of law. That is the circumstance

here. Substantial evidence requires a finding of lack of good faith, and we therefore affirm the judgment awarding Dalos treble damages.

CONCLUSION

¶ 38 We affirm the trial court's grant of summary judgment to Dalos on his claim for unpaid wages. We also award Dalos his reasonable attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01(A) subject to his compliance with Rule 21(c) of the Arizona Rules of Civil Appellate Procedure.

CONCURRING: LAWRENCE F. WINTHROP, Presiding Judge and JON W. THOMPSON, Judge.

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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, Plaintiff/Appellant, vs. ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; GIANT ELECTRIC CORPORATION, an Arizona corporation, Defendants/Appellees.	No. 1 CA-CV 09-0065 Maricopa County Superior Court No. CV2007-012149

PLAINTIFF'S/APPELLANT'S PETITION FOR REVIEW

Pursuant to Rule 23, Arizona Rules of Civil Appellate Procedure Plaintiff/Appellant Progressive Casualty Insurance Company ("Progressive") petitions the Supreme Court to review the Court of Appeals' May 20, 2010 opinion. The Court of Appeals' opinion creates statewide confusion by its failure to address and analyze the preemptive effect of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 to 7006 ("E-SIGN") with regard to Arizona statutory requirements for written documentation. The opinion also fails to analyze the effect of the legislature's enactment of the Arizona Electronic Transaction Act, A.R.S. §§ 44-7001 to -7051 ("AETA") of Arizona statutory law. Finally, and most disturbing, the opinion impermissibly creates an exception by pure judicial fiat to E-SIGN and AETA by denying legal effect to Progressive's offer of uninsured motorist/underinsured motorist ("UM/UIM") coverage to Defendant/Appellee Giant Electric Corporation ("Giant Electric") solely because the offer was conveyed and documented in electronic form.

This Court should grant review because:

1) It is a matter of statewide importance for this Court to be heard on the preemptive effect of E-SIGN and AETA on Arizona statutory and caselaw requirements pertaining to written documents.

2) It is a matter of statewide importance that this Court be the one to determine if the courts should impose an exception upon AETA for UM/UIM notices under A.R.S. § 20-259.01, that the Arizona Legislature chose not to include in AETA.

3) It is a matter of first impression and statewide importance for this Court to determine if E-SIGN and AETA allow electronic and/or digital notices and offers of UM/UIM coverage in both personal and commercial insurance policies written in Arizona, subsequent to their enactment in 2000.

4) In order to avoid confusion and provide necessary guidance, this Court should harmonize its decision on the UM/UIM statute's "written notice" requirement set forth in *Ball v. American Motorist Insurance Co.*, 181 Ariz. 124, 888 P.2d 1311 (1995), with today's contemporary commerce under E-SIGN and AETA.

ISSUES DECIDED BY THE COURT OF APPEALS AND PRESENTED FOR REVIEW

1) Whether the Court of Appeals erred in ruling that a contemporaneously, digitally recorded conversation cannot satisfy the "written notice" requirement in Arizona's UM/UIM statute, A.R.S. § 20-259.01?

ISSUES PRESENTED TO, BUT NOT DECIDED BY, THE COURT OF APPEALS AND WHICH MAY NEED TO BE DECIDED IF REVIEW IS GRANTED

1) Whether E-SIGN and AETA preempt Arizona's UM/UIM statute, to the extent the UM/UIM statute purports to invalidate any possibility of an electronically documented notice and offer of UM/UIM coverage.

MATERIAL FACTS

Progressive brought this action pursuant to A.R.S. § 12-1831, the Arizona Declaratory Judgment Act, seeking a declaration that the insurance policy it issued to Defendant/Appellee Giant Electric had uninsured/underinsured motorist ("UM/UIM") coverage limits of $100,000 per claim and $300,000 in the aggregate. [*See* Index of Record on Appeal ("ROA") 1]. On November 12, 2001, Progressive received a telephone call from Christopher W. Thompson, the President/CEO of Giant Electric. As is common in today's marketplace, Giant Electric applied for insurance with Progressive through this telephone call. [Exhibit 2 to ROA 20]. The telephone conversation was electronically recorded, [Exhibits 2 and 3, ROA 20]. Mr. Thompson requested liability insurance in the amount of $1,000,000. [Exhibit 2 to ROA 20, at 8:294-96, 11:424]. During the telephonic application process, Mr. Thompson informed Progressive that his previous policy with Hartford Insurance Company of the Midwest had $1,000,000 of UM/UIM coverage.

[Exhibit 2 to ROA 20, at 13:505-509] Progressive informed Mr. Thompson that he could purchase UM/UIM coverage in the amount of $15,000 to $1,000,000. [Exhibit 2 to ROA 20, at 12:486-87]. Mr. Thompson was offered UM/UIM coverage in the amount of $1,000,000, but rejected that amount. [Exhibit 2 to ROA 20, at 18:724-19:790]. Progressive explained the differing UM/UIM coverage limits available and the price for such coverage. [*Id.*]. In response to this electronically conveyed notice and offer, Mr. Thompson chose $100,000 of UM/UIM coverage. [*Id.*]. Thereafter, Progressive issued a commercial auto policy ("Policy") to Giant Electric for the policy term of January 5, 2001 through January 1, 2002. [Exhibit 1 to ROA 20]. The Policy provided coverage with $1,000,000 in liability coverage and UM/UIM limits of $100,000 per claim and $300,000 in the aggregate. [*Id.*]. The Policy was renewed for six (6) successive years with the same UM/UIM coverage limits. [*Id*].

On or about September 12, 2006, Jose Juan Palomera-Ruiz was involved in an automobile accident, in which he sustained fatal injuries. [ROA 1, ¶ 20; ROA 15, at 3:24]. Defendant/Appellee Estate of Jose Juan Palomera-Ruiz ("Estate") demanded $1,000,000 to settle his UM/UIM claim arising out of the accident, alleging that the selection of UM/UIM limits by Giant Electric was ineffective and that the Policy provides UM/UIM coverage limits in the amount equal to the liability limits. [ROA 1, ¶ 21, 22, 24].

The Estate and Progressive filed Cross Motions for Summary Judgment on the issue of whether the electronically recorded phone conversation constituted a writing such that it satisfied the "written notice" requirement in Arizona's UM/UIM statute, A.R.S. § 20-259.01. [ROA 15, 19]. Giant Electric did not join in the Estate's Motion for Summary Judgment. [ROA 15; Exhibit 1 to ROA 39]. The trial court granted the Estate's Motion for Summary Judgment and denied Progressive's Cross Motion for Summary Judgment. [ROA 68]. The trial court entered judgment in favor of Giant Electric and the Estate, holding that the Policy's UM/UIM limits were $1,000,000 at the time of the September 12, 2006 accident. [ROA 68]. The trial court believed the decision of *Ball v. American Motorist Insurance Co.*, 181 Ariz. 124, 888 P.2d 1311 (1995), required this result. [Transcript of 4/14/08 Oral Argument at 17:1-4]. Progressive timely appealed. [ROA 73]. On May 20, 2010, the Court of Appeals affirmed grant of summary judgment to the Estate.

REASONS WHY REVIEW SHOULD BE GRANTED

I. The Court of Appeals Failed to Acknowledge that E-SIGN and AETA Preempt the "Written Notice" Requirement in Arizona's UM/UIM Statute, to the Extent the UM/UIM Statute Purports to Invalidate an Electronic Offer of UM/UIM Coverage.

Both E-SIGN and AETA preempt the requirement in Arizona's UM/UIM statute, A.R.S. § 20-259.01, that

an insurer "shall by written notice offer the insured and at the request of the insured shall include within the policy underinsured motorist coverage . . . in limits not less than the liability limits for bodily injury or death contained within the policy," to the extent the UM/UIM statute purports to invalidate any electronic offer of UM/UIM coverage. The Court of Appeals' decision created confusion in the law because it ignored this preemption issue.

The Supremacy Clause provides that where states and the federal government pass legislation on the same subject matter, the federal law is supreme, and the conflicting state law is rendered void. *See* U.S. CONST. art. VI The McCarran-Ferguson Act[1] governs federal preemption of state insurance laws and provides in relevant part as follows:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . *unless such Act specifically relates to the business of insurance.*

15 U.S.C. § 1012(b) (emphasis added). Here, Congress specifically provided that E-SIGN applies to the business of insurance, as follows:

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[1] 15 U S C § 1011 *et seq*

> (i) Insurance
>
> It is the specific intent of the Congress that this subchapter and subchapter II of this chapter *apply to the business of insurance.*

15 U.S.C. § 7001(i) (emphasis added). Construing 15 U.S.C. § 7001(i) and 15 U.S.C. § 1012(b) together, E-SIGN thus preempts all state insurance laws, including Arizona's UM/UIM statute, A.R.S. § 20-259.01.

Likewise, rather than modifying each and every statute in Arizona containing an "in writing" or "written" requirement, the Arizona legislature enacted AETA in order to achieve a global effect on and modify all Arizona laws, including A.R.S. § 20-259.01(B). Specifically, A.R.S. § 44-7006(3) provides that AETA should be construed and applied to "make uniform the law of this state." Similarly, A.R.S. § 44-7007(C) provides that "an electronic record satisfies *any law* that requires a record to be in writing." (emphasis added). Therefore, AETA invalidates A.R.S. § 20-259.01(B) to the extent that A.R.S. § 20-259.01(B) purports to require an offer of UM/UIM coverage in paper form where an electronic record is used.

Importantly, the Legislature could have exempted Arizona's UM/UIM statute from the scope of AETA, but it chose not to. Section 3 of the model Uniform Electronic Transactions Act ("UETA") lists three (3) specific areas of law which are exempt from its scope, and also allows States that adopt the mode act to exempt other laws as well:

> (b) This [Act] does not apply to a transaction to the extent it is governed by:
>
> (1) a law governing the creation and execution of wills, codicils, or testamentary trusts;
>
> (2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2 and Article 2A];
>
> (3) [the Uniform Computer Information Transactions Act]; and
>
> **(4) [other laws, if any, identified by State].**

UETA § 3 (scope) (emphasis added). However, the Arizona legislature enacted only the first two (2) exceptions and declined to create new exceptions, including declining to adopt a specific exception for the UM/UIM statute. *See* A.R.S. 44-7003(B). The legislature's decision to allow for only two (2) exceptions clearly illustrates that the legislature specifically considered the exemption section provided in the model act and deliberately chose what exemptions to apply to Arizona law. The fact that the legislature thus chose to specifically not exempt Arizona's UM/UIM statute, A.R.S. § 20-259.01(B), shows AETA does modify the statute.

The Prefatory Notes to the model UETA act also emphasize the importance of applying the act broadly and without any judicially-created exceptions:

> The need for certainty as to the scope and applicability of this Act is critical, and makes

> any sort of a broad, general exception based on notions of inconsistency with existing writing and signature requirements unwise at best. The uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws is unacceptable if electronic transactions are to be facilitated.

UETA Prefatory Note (A).

Accordingly, to the extent E-SIGN and AETA conflict with the UM/UIM statute, E-SIGN and AETA must control.

The Court of Appeals did not address either of these primary issues – Federal preemption and the applicability of AETA. This Court should accept review and decide these important preemption issues with regard to our increasingly electronic and digital commerce.

II. The Applicability of E-SIGN and AETA to the UM/UIM Statute Is a Matter of First Impression and of Statewide Importance Because the Court of Appeals' Decision Applies to All Electronic Offers of UM/UIM Coverage in Both Personal and Commercial Insurance Policies Written in Arizona Subsequent to the Enactment of E-SIGN and AETA in 2000.

E-SIGN and AETA were enacted in 2000. A new body of law interpreting these statutes has yet to

develop. The applicability of E-SIGN and AETA to the UM/UIM statute is a matter of first impression in Arizona. Indeed, no reported case in any jurisdiction has addressed the applicability of E-SIGN or a comparable state electronic commerce law, in the context of a UM/UIM statute. This Court should accept review because Arizona needs guidance on the proper application of E-SIGN and AETA.

E-SIGN states in relevant part:

> (a) In general
>
> Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –
>
> (1) a signature, contract, *or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form;* and
>
> (2) a contract relating to such transaction *may not be denied legal effect,* validity, or enforceability solely because an electronic signature or *electronic record was used in its formation.*

15 U.S.C. § 7001 (emphasis added).

The statute provides the following definitions:

> (2) Electronic
>
> The term "electronic" means relating to technology having electrical, digital,, magnetic,

> wireless, optical, electromagnetic, or similar capabilities.
>
> * * *
>
> 4) Electronic record
>
> The term "electronic record" means a contract or other record *created, generated, sent, communicated, received, or stored by electronic means.*

15 U.S.C.A. § 7006 (emphasis added).

Consistent with federal law, the Arizona Legislature adopted AETA, which provides in relevant part:

> Legal recognition of electronic records, signatures and contracts
>
> A. A record or signature in electronic form cannot be denied legal effect and enforceability solely because the record or signature is in electronic form.
>
> B. A contract formed by an electronic record cannot be denied legal effect and enforceability solely because an electronic record was used in its formation.
>
> C. An electronic record satisfies any law that requires a record to be in writing.

A.R.S. § 44-7007.

The legislature stated that AETA should be construed and applied to:

> 1. Facilitate electronic transactions consistent with other applicable law.

> 2. Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.
>
> 3. Effectuate its general purpose to make uniform the law of this state with respect to the subject of this chapter for intrastate, interstate and international transactions.

A.R.S. § 44-7006. E-SIGN's and AETA's definition of "electronic" contain no reference to "visual" capability. AETA's definition is nearly identical to E-SIGN:

> "Electronic" means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities.

A.R.S. § 44-7002(5). Thus, AETA is similar to and consistent with E-SIGN.

Under these broad definitions, the recorded offer/notice is clearly "electronic". [*See* Exhibit 3 to ROA 20 for description of Progressive's electronic recording process]. The recorded phone call between Mr. Thompson and Progressive's agent was created, generated, sent, communicated, received, *and* stored by electronic means, even though E-SIGN and AETA only require that *one* of those criteria be met. [*See* Exhibit 3 to ROA 20 for description of Progressive's electronic recording process]. Thus, pursuant to E-SIGN and AETA, the electronically recorded notice by which Progressive offered UM/UIM limits of $1,000,000 satisfies the "written notice" requirement

of A.R.S. § 20-259.01(B) and must be given legal effect.[2]

Yet in a footnote and without analysis, the Court of Appeals created a huge new exception by judicial fiat to E-SIGN and AETA, stating that "[e]ven if the electronic recording at issue qualifies as a 'writing' in other contexts, neither it nor any other type of written notice was *provided* to the insured." [Court of Appeals' Opinion at 9, ¶ 14, n.2 (emphasis added)]. Contrary to the Court of Appeals' statement, the operative verb in the UM/UIM statute is "offer", not "provide". A.R.S. § 20-259.01(B) (requiring that an insurer "shall by written notice offer the insured" UM/UIM coverage up to the liability limits.). This Court has held that the meaning of "offer" in the

---

[2] Furthermore, Ariz. R. Evid. 1001 provides in relevant part

> (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
>
> (3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it

The electronically recorded telephone conversation between Mr. Thompson and Progressive qualifies as a writing within the meaning of the above-quoted provision. Therefore, even in the absence of E-SIGN, under AETA and Ariz. Evid. 1001, Progressive satisfied the requirements of Arizona's UIM statute.

UM/UIM statute is "[t]o bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not." *Tallent v. National General Ins. Co.*, 185 Ariz. 266, 267-68, 915 P.2d 665, 666-67 (1996) (citing BLACK'S LAW DICTIONARY 1081 (6th ed. 1990); CORBIN ON CONTRACTS § 1.11 (revised ed. 1993) ("An offer is an expression by one party of assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express assent to the same terms."); RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.")).

Consistent with *Tallent*, and contrary to the Court of Appeals' opinion, the insurer need not "provide" the consumer with a contemporaneously retainable copy of the UM/UIM offer. For example, if Progressive's agent had met Mr. Thompson in person and directed him to a poster attached to the wall setting forth the UM/UIM offer, Progressive would have "by written notice offer[ed]" the coverage consistent with A.R.S. § 20-259.01(B).

Similarly, Mr. Thompson could have logged onto Progressive's website (without an agent assisting him) and be shown the UM/UIM offer on his computer screen and given the option to accept or reject the offer. Under these circumstances, Progressive would not have "provided" anything to Mr. Thompson. Yet,

under the Court of Appeals' rationale, because nothing was "provided" in either hypothetical, Progressive would not have complied with the UM/UIM statute, even though it would have complied with both E-SIGN and AETA. The Court of Appeals' requirement of contemporaneous retention is simply not in the statute, and this Court should correct that error.

The Court of Appeals' judicially-created exception to E-SIGN and AETA is a matter of statewide importance because the decision applies to all electronic offers of UM/UIM coverage in both personal and commercial insurance policies written in Arizona, subsequent to the enactment of E-SIGN and AETA in 2000. Insurance carriers like Progressive have relied on E-SIGN and AETA for the validity of electronic transactions and records. The Court of Appeals' decision casts doubt and confusion upon the legal efficacy of those transactions and records. Consequently, this Court should clear up the confusion by accepting review and reversing the Court of Appeals.

III. This Court Should Harmonize Its Decision in *Ball v. American Motorist Insurance Co.*, Which Was Prior to the Enactment of E-SIGN and AETA.

In *Ball v. American Motorist Insurance Co.*, 181 Ariz. 124, 127, 888 P.2d 1311, 1314 (1995), this Court refused to create a waiver exception to A.R.S. § 20-259.01(B) and held that "[t]he statutory requirement of a written offer is absolute on its face." The trial

court explicitly relied on *Ball,* and the Court of Appeals implicitly held that *Ball* controls this case. [Transcript of 4/14/08 Trial Court Oral Argument at 17:1-4; Court of Appeals Opinion at 11, ¶ 18]. But this Court decided *Ball* in 1995, prior to the enactment of E-SIGN and AETA. The existing body of Arizona case law relating to the UM/UIM statute is now obsolete to the extent it conflicts with E-SIGN/AETA. A new body of law must develop, and *Ball* must be harmonized accordingly.

In *Ball*, the estate of an employee who was killed in an accident with an underinsured motorist brought suit against the employer's automobile insurer seeking UIM coverage under the employer's policy. 181 Ariz. at 124-25, 888 P.2d at 1311-12. The carrier filed affidavits attached to a motion for summary judgment, where the risk manager testified that the insured company did not want and would have rejected any offer of UIM coverage. The carrier argued that when the insurer and named insured agree that the named insured did not want UIM coverage, and the named insured so informed the insurer, the written offer requirement is waived. The Superior Court entered summary judgment for the insurer, finding that the employer had waived the statutory requirement that a written offer of UIM coverage be made to the named insured. *Id.* The Court of Appeals affirmed. *Id.* This Court reversed, holding that the employer as named insured under the policy could not waive the statutory requirement that the insurer extend a written offer of UIM coverage. *Id.* at 127,

888 P.2d at 1314. This Court determined that the intent of the Legislature in enacting A.R.S. § 20-259.01 was "to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others." *Ball,* 181 Ariz. at 126-27, 888 P.2d at 1313-14. Justice Martone reasoned that the written notice requirement "is the only sure and uniform way to avoid credibility contests over whether such an offer was actually made." 181 Ariz. at 128, 888 P.2d at 1315.

Thus, *Ball* did not involve electronic records. It pre-dated E-SIGN an AETA. The concerns over credibility expressed by Justice Martone in *Ball* do not support a judicially-created exception to E-SIGN/AETA. A contemporaneous electronic recording when a UM/UIM offer is made is not subject to imperfect recollections years later by the parties. The electronic recording, is an accurate recordation of the events as they transpired. In this case, the communications between Giant Electric and Progressive are recorded so that this Court can know precisely that the issue of UM/UIM coverage was discussed, the various coverage limits offered, and the desired coverage amount selected by the insured, Giant Electric. Indeed, the Court of Appeals did not dispute that the electronic recording of the offer indicates that Giant Electric unequivocally rejected $1,000,000 UM/UIM limits and selected lower limits. Instead, the Court of Appeals' decision rests solely upon the electronic form of the offer. This reasoning has been soundly rejected by Congress and the Arizona

Legislature. The electronic recording of the UM/UIM offer satisfied the purpose of ARS. § 20-259.01 and should be given legal effect.

CONCLUSION

For the foregoing reasons, this Court should accept review and reverse. Progressive also respectfully requests its attorneys' fees incurred on appeal and in this proceeding because this is a matter arising out of contract. *See* A.R.S. § 12-341.01(A).

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, JOHN K. WITTWER, being first duly sworn upon his oath, deposes and says:

That he has made service of the foregoing Petition for Review by filing the original and seven (7) copies with:

Phillip G. Urry, Clerk of the Court
Arizona Court of Appeals, Division One
1501 W. Washington Street
Phoenix, Arizona 85007

and by causing to be mailed this day two (2) copies to:

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DATED this 15th day of June, 2010.

/s/ John K. Wittwer
JOHN K. WITTWER

SUBSCRIBED AND SWORN to before me this 15th day of June, 2010.

/s/ C. D. Knutson
NOTARY PUBLIC

My Commission Expires: [SEAL]

04-23-2014

CERTIFICATE OF COMPLIANCE

STATE OF ARIZONA)
) ss:
County of Maricopa)

JOHN K. WITTWER, being first duly sworn upon his oath, deposes and says:

1. The accompanying Opening Brief has double line spacing and uses proportionately spaced typeface of Times New Roman, 14 point size, and 3489 word count.

/s/ John K. Wittwer
JOHN K. WITTWER

SUBSCRIBED AND SWORN to before me this 15th day of June, 2010.

/s/ C. D. Knutson
NOTARY PUBLIC

My Commission Expires:
04-23-2014

[SEAL]

RESPECTFULLY SUBMITTED this 15th day of June, 2010.

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184 (2)

No. 10-963

MAR 29 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation,
Petitioner,

v.

ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; GIANT ELECTRIC CORPORATION, an Arizona corporation,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Arizona, Division One

RESPONSE OF ESTATE OF JUAN PALOMERA-RUIZ IN OPPOSITION TO PETITION FOR CERTIORARI

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March 29, 2011

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QUESTIONS PRESENTED

1. Does E-SIGN invalidate the Arizona UM/UIM statute or is E-SIGN inapplicable by its own terms?

2. Does the opinion of the Arizona Court of Appeals in this case conflict with the New Mexico Supreme Court's *Jordan* opinion in a way that warrants this Court's attention?

TABLE OF CONTENTS[1]

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL STATUTORY PROVISION ... 1

STATEMENT OF THE CASE 2

WHY CERTIORARI SHOULD NOT BE GRANTED 7

I. E-SIGN is inapplicable by its own terms. .. 9

II. The opinion of the Arizona Court of Appeals in this case does not conflict with the New Mexico Supreme Court's *Jordan* decision. . 18

CONCLUSION 20

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[1] On authority of Sup Ct. 15.3 and 24.2, the Respondent Estate omits Parties to the Proceeding, Opinions Below, and a Statement of Jurisdiction, as the Estate is satisfied with Petitioner's presentation of those sections.

TABLE OF AUTHORITIES

Page

CASES:

Estate of Ball v. Am. Motorists Ins. Co.,
888 P.2d 1311 (Ariz. 1995) 2, 7

Jordan v. Allstate Ins. Co.,
___ P.3d ___, 2010-NMSC-051, Oct. 18, 2010,
reh'g denied, Dec. 3, 2010 ..... 18, 19

Progressive Casualty Ins. Co. v. Estate of Palomera-Ruiz,
231 P.3d 384 (Ariz. Ct. App. 2010) ..... *passim*

STATUTES AND RULES:

15 U.S.C. §§ 7001 *et seq.* ..... *passim*

Ariz. Rev. Stat. §20-259.01 ..... *passim*

Ariz. Rev. Stat. §§ 44-7001 *et seq.* 6, 9, 10, 11

N.M. Stat. Ann. 1978, § 66-5-301 (1983) 18

U.S. Sup. Ct. R. 15.3 ii

U.S. Sup. Ct. R. 24.2 ii

SUPPLEMENTAL STATUTORY PROVISION

With one exception, the Respondent Estate of Jose Juan Palomera-Ruiz is satisfied with Petitioner's compilation titled "Constitutional and Statutory Provisions Involved." At page 4 of its Petition, Petitioner has included the text of Ariz. Rev. Stat. § 20-259.01(B), which governs the issuance of *underinsured* motorist (UIM) coverage in Arizona. Because the underlying dispute arises from a collision with an uninsured motorist, the more appropriate reference is to subsection A of the same statute. Ariz. Rev. Stat. § 20-259.01(A), which governs the issuance of *uninsured* motorist (UM) coverage in Arizona, provides:

> **A.** Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and shall by written notice offer the insured and at the request of the insured shall include within the policy uninsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy. The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director shall be valid for all insureds under the policy. The completion of such form is not required where the insured purchases such coverage in an amount equal to the limits for bodily injury or death contained in the policy. The offer need not be made in the event of the reinstatement of a lapsed policy or the transfer, substitution, modification or renewal of an existing policy. At

> the request of the insured, the insured may purchase and the insurer shall then include within the policy uninsured motorist coverage that extends to and covers all persons insured under the policy in any amount authorized by the insured up to the liability limits for bodily injury or death contained within the policy.

Ariz. Rev. Stat. § 20-259.01(A).

STATEMENT OF THE CASE

This case concerns the validity of an Arizona statutory requirement that every insurer writing motor vehicle liability policies in Arizona "*shall by written notice offer the insured*" both uninsured ("UM") and underinsured ("UIM") motorist coverage "in limits not less than the liability limits for bodily injury or death contained with the policy." Ariz. Rev. Stat. §20-259.01 (A) and B) (respectively governing uninsured and underinsured motorist coverage) (emphasis added). The Arizona Supreme Court has held that this "statutory requirement of a written offer is absolute on its face." *Estate of Ball v. Am. Motorists Ins. Co.*, 888 P.2d 1311, 1314 (1995). The requirement is unwaivable, and the consequence of an insurer's noncompliance is to include UM and UIM coverage within the policy in an amount equal to the bodily injury liability limits of the policy. *Id.* at 1313 -14.

It is undisputed that Petitioner, the Progressive Casualty Insurance Company, did not make a written offer of uninsured motorist coverage to Respondent Giant Electric. It did so orally in the course of a telephone conversation, a transcript of which

Progressive has provided in its Appendix (Petitioner's App. at 78-121). Giant Electric's owner and President Christopher W. Thompson initiated the conversation by telephoning Progressive's 1-800 number, activating a recording system Progressive uses to record such calls. (Transcript, Petitioner's App. at 78-79; Koskinen Declaration, Petitioner's App. at 122-125).

Thompson informed Progressive's agent Victoria that his current $1 million liability policy with Hartford was about to renew and that he was shopping "to see where ... insurance was at." (Transcript, Petitioner's App. at 82, 85-86). After concluding that Thompson wished to maintain $1 million in liability coverage, Victoria questioned him about other elements of his Hartford policy and established that it included $1 million in UM/UIM coverage as well. (*Id.* at 90-93). Their conversation continued as follows:

> **Victoria:** Now one thing you may wanna -- it's up, this is up to you. The uninsured and the underinsured motorist coverage where you said a million dollars.
>
> **Thompson:** Yeah.
>
> **Victoria:** Technically it's up to you. Those coverages don't have to be at a million.
>
> **Thompson:** Yeah.
>
> **Victoria:** Your liability's at a million already but if you want less coverage on your underinsured ...

Thompson: That, that's kind of driven by our vendors.

***

Victoria: Usually the, they just care about the liability.

Thompson: Right.

Victoria: That's usually what their concern is. But, um, I can get your rate down a little bit if you wanna reduce the coverage on the uninsured.

Thompson: Well, I think that'd be worth lookin' at. Yeah.

***

Victoria: It's up to you. Let's see, if I go down to let's say half that, 500,000 paid in full I can bring it down to 1,278. If you wanna go down even more it'll come down even more. I can go...

Thompson: Take it down, OK.

Victoria: ... for example, uh, I don't know if you wanna go, let's say 100,000.

Thompson: Yeah.

Victoria: Um, I can bring this down to 1,177.

Thompson: So good, that'll be great.

Victoria: Is that OK?

Thompson: Yep.

(*Id.* at 99-101).

The policy was written and issued accordingly, renewed in successive years, and in force at the time of the accident from which this case arises. (Petitioner's App. at 76). Meanwhile, the recorded conversation between Thompson and Victoria was digitally archived by Progressive, first "on the call recording device's hard drive" and later on "AIT-2 tape." (Koskinen Declaration, Petitioner's App. at 122-25).

In September 2006, Juan Palomera-Ruiz, a passenger in a Giant Electric utility van insured under Progressive's policy, suffered fatal injuries in a collision with an uninsured motorist. When a dispute arose over the amount of UM/UIM coverage available to Palomera-Ruiz's Estate, Progressive retrieved the Thompson phone call recording from its archive and "burned [it] to a CD." (*Id.*)

In a declaratory judgment action filed by Progressive in the Maricopa County branch of the Superior Court of Arizona, Progressive claimed that its UM coverage limits of $100,000 per claim and $300,000 per occurrence were effective as written. The Estate responded that, as a consequence of Progressive's failure to satisfy the written offer requirement of Ariz. Rev. Stat. §20-259.01(A), the policy must be held as a matter of law to provide UM coverage in the amount equal to its $1 million liability coverage. The case was submitted on cross-motions for summary judgment, and by order of November 25,

2008, the Superior Court denied Progressive's motion and granted summary judgment in favor of the Estate. (Superior Court Order, Petitioner's App. at 13-15).

In *Progressive Casualty Ins. Co. v. Estate of Palomera-Ruiz,* 231 P.3d 384 (Ariz. Ct. App. 2010) (hereinafter, *Progressive v. Palomera-Ruiz*), the Arizona Court of Appeals affirmed the trial court's judgment (Arizona Court of Appeals opinion, Petitioner's App. at 1 – 12); and on October 26, 2010, the Arizona Supreme Court denied Progressive's Petition for Review. (Arizona Supreme Court order, Petitioner's App. at 16 - 17). Progressive's account of the disposition of its action in the Arizona courts is largely accurate with one exception. According to Progressive, the Arizona Court of Appeals "refused to address the preemptive effects of E-SIGN and AETA." (Petition at 8). This is inaccurate. The Court of Appeals did address Progressive's E-SIGN and AETA argument in a footnote that Progressive itself goes on to quote in full:

> We likewise find unavailing Progressive's claim that the recorded telephone conversation qualifies as a written notice in light of (1) the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 to 7006 (2000) (E-SIGN): and (2) the Arizona Electronic Transaction Act, A.R. S. §§ 44-7001 to -7501 (AETA) (2003 & Supp. 2008). Even if the electronic recording at issue qualifies as a "writing" in other contexts, neither it nor any other type of written notice was provided to the insured. Here, because the only notice Progressive extended to the insured was oral, it

> failed to satisfy A.R.S. §20-259.01's express requirement of a "written notice."

231 P.2d at 388, n. 2, *quoted* in Petition at 8-9.

This disposition, though succinct, gave adequate attention to the argument that Progressive based on E-SIGN and AETA, as both statutes are inapplicable by their own terms.

WHY CERTIORARI SHOULD NOT BE GRANTED

The single most salient fact of this matter is that Progressive made an oral telephonic offer, not a written one, to its insured.

A motor vehicle insurer is statutorily obliged in Arizona to offer UM/UIM coverage in amounts equal to the bodily injury liability limits of its policy and to convey written notice of that offer to the insured. Ariz. Rev. Stat. §20-259.01. UM/UIM coverage equal to liability coverage is imposed by Arizona law when an insurer fails to satisfy the written offer requirement. *Estate of Ball v. Am. Motorists Ins. Co.*, 888 P.2d 1311, 1313-14 (Ariz. 1995). Progressive refers to this as a "purported writing requirement contained in Arizona's statute." (Petition at 11). But there is nothing purported about it. The Arizona Supreme Court has described it as "absolute." *Ball*, 888 P.2d at 1314.

Progressive made no offer in writing. It did not mail the insured a paper copy of its offer. It did not e-mail or fax the insured an electronic copy of its offer. And though it made an electronic recording of the

telephonic sales transaction with its insured, it simply archived the recording untranscribed, neither mailing nor e-mailing nor faxing to its insured a transcription of the offer it made orally in that call. In short, Progressive engaged its insured in an entirely oral transaction, providing no written notice of its offer whatsoever, electronic or otherwise. Though electronic means to convey written notice were readily available, Progressive did not use them.

From the outset of this prolonged litigation, Progressive has sought to escape the consequences of its failure by asserting to a series of courts that, because it retained a digital recording of its oral offer, that oral offer constituted -- or should be held to constitute -- a written offer. In constructing its arguments Progressive has defied plain statutory language, including that of the federal E-SIGN statute it now moves to center stage, just as it has defied the plain meaning of language itself.

The themes of Respondent's argument are plain: (a) an oral offer is not a written offer and E-SIGN does not make it so; and (b) an electronic recording of an oral offer is not a written offer and E-SIGN does not make it so.

We have placed some emphasis on Progressive's failure to attempt by fax or e-mail to provide an electronic form of written notice of its offer to its insured. We do so because, contrary to Progressive's suggestion at page 18 of its Petition, nothing in the text or interpretation of Arizona's UM/UIM statute suggests that the requisite "offer by written notice" must be conveyed "in paper form" alone.

I. E-SIGN IS INAPPLICABLE BY ITS OWN TERMS[2]

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[2] The Estate will confine the text that follows to addressing E-SIGN, the federal statute that Progressive asserts as preemptive of the written notice requirement of Ariz. Rev. Stat. §20-259.01. In this footnote, however, the Estate will comment in passing on Progressive's curious argument that the application of §20-259.01 should have been precluded also by AETA, the Arizona Electronic Transaction Act, Ariz. Rev. Stat. §§ 44-7001 *et seq.*, if the Arizona courts had not improperly interpreted that statute.

Leaving aside that the U.S. Supreme Court does not oversee or undertake to supplant a state court's interpretation of its own state statute, Progressive's argument ignores two things: (1) the unambiguous text of AETA itself and (2) the distinction between an offer and the record of an offer.

> AETA provides in pertinent part:
>
> (A) A record or signature in electronic form cannot be denied legal effect and enforceability *solely because the record or signature is in electronic form.*
>
> (B) A contract formed by an electronic record cannot be denied legal effect and enforceability *solely because an electronic record was used in its formation.*
>
> (C) An electronic *record* satisfies any law *that requires a record to be in writing.*

Ariz. Rev. Stat. §44-7007 (emphasis added).

To examine the text in light of the distinction between an offer and the record of an offer is instructive. The Arizona courts did not find Progressive's oral agreement with Giant Electric to be deficient because the record of that transaction was in electronic form. *See* §44-7007(A). Nor did the Arizona courts find that agreement deficient because an electronic record rather than a paper record was used to maintain evidence of its formation. *See* §44-7007(B). No statutory deficiencies were alleged with respect to Progressive's recording or record keeping methodology. However satisfactorily Progressive may have recorded and preserved the record of its oral offer, what it failed to do in the course of its transaction was make the offer "by written notice."

To put the point in terms of §44-7007(C), that subsection is utterly unambiguous in providing, "An electronic record satisfies any law that requires a record to be in writing." But §20-259.01

Progressive argues that the written offer requirement of §20-259.01 is preempted by 15 U.S.C. § 7001(a), which provides:

> **(a) In general**
>
> Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce –
>
> (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforcement solely because it is in electronic form; and
>
> (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

15 U.S.C. § 7001(a).

In its E-SIGN argument as in its AETA argument, Progressive declines to confront the distinction between an offer and the record of an offer. Contrary to repeated assertions throughout its brief, the electronic *record* of Progressive's transaction was not denied validity or effect; the format of its record-

---

does not require *a record* to be in writing. It requires *an offer* to be in writing. Had Progressive made a written offer, as §20-259.01 requires, this case would not be here. Progressive's fault lies not in the record but in the offer, and the fault is not redeemed by AETA.

keeping was irrelevant to the disposition of the case. The Arizona Court of Appeals made this clear when stating, "although the recording provides reliable evidence of what was said in the pertinent conversation, Progressive did not satisfy the statutory requirement that a "written notice" of the offer be provided." *Progressive v. Palomera-Ruiz*, 231 P.3d at 388. As we said of Progressive's invocation of AETA, (*see* n. 2, *supra*), Progressive's fault lies not in the record but in the offer, and the fault is not redeemed by E-SIGN.

Progressive also claims that "E-SIGN preempts all state laws that purport to require a writing" (Petition at 10). To the contrary, however, in 15 U.S.C. § 7001 (c) (1), E-SIGN expressly accommodates state statutes that require information relating to a commercial transaction to "be provided or made available to a consumer in writing." Pursuant to E-SIGN, one may make such "consumer disclosures" by electronic record, but only upon compliance with a detailed protocol for obtaining the consumer's consent. The statute provides in pertinent part:

> **(c) Consumer disclosures**
>
> **(1) Consent to electronic records**
>
> *Notwithstanding subsection (a) of this section, if a statute*, regulation, or other rule of law *requires that information relating to a transaction* or transactions in or affecting interstate or foreign commerce *be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such*

information satisfies the requirement that such information be in writing if—

(A) *The consumer has affirmatively consented to such use and has not withdrawn such consent*;

(B) The consumer, prior to consenting, is provided with a clear and conspicuous statement—

(i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and

***

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

(C) the consumer—

(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that

will be used to provide the information that is the subject of the consent;[3] and

(D) after the consent of a consumer in accordance with subparagraph (A), if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record—

(i) provides the consumer with a statement of (I) the revised hardware and software requirements for access to and retention of the electronic records, and (II) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under subparagraph (B)(i); and

---

[3] The consent requirement of § 7001(c)(1)(C)(ii) is qualified in § 7001(c)(2)(3), which provides:

> **(3) Effect of failure to obtain electronic consent or confirmation of consent**
> The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1) (C) (ii).

This paragraph does not, however, as Progressive argued in its brief to the Arizona Court of Appeals, qualify the consent requirements of § 7001(c) (1) (A). (*See* Petitioner's App. at 221-22), It is expressly limited to the additional consent requirement of paragraph (c) (1) (C) (ii).

(ii) again complies with subparagraph (C).

15 U.S.C. § 7001 (c) (1) (emphasis added).

Subsection 15 U.S.C. 7001 (c) pertains to statutes that "require[] that information relating to a transaction be provided or made available to a consumer in writing." Arizona's UM/UIM statute meets that description in requiring that a motor vehicle insurer must "by written notice offer the insured and at the request of the insured ... include within the policy" UM and UIM coverage in limits not less than the liability limits of the policy. Ariz. Rev. Stat. § 20-259.01 (A) and (B).

Progressive claims otherwise, stating,

> Prior to this case, there was never a requirement in Arizona's UM/UIM statute that the insurer physically "provide the consumer with a contemporaneously retainable copy of the UM/UIM offer. The operative verb in Arizona's UM/UIM statute is "offer," not "provide."

(Petition at 15). This argument, however, defies common usage and understanding. While Progressive may have identified the operative verb "offer," it has neglected the adverbial phrase "by written notice" that specifies precisely how an insurer "shall ... offer" the coverage. It is impossible, at least as we understand the English language, to make an offer by written notice unless the offering party *provides* written notice of the offer.

The Arizona Court of Appeals has indeed explained why § 20-259.01 requires the requisite notice to be provided in writing to an insurance consumer:

> Nor can it be said that a literal interpretation of "written notice" leads to an absurd result or otherwise frustrates the legislature's intent. Quite the contrary. An oral notification obviously cannot be read and does not provide the same opportunity for review as does a written notice, and the insured is therefore less likely to comprehend the significance of what is being offered if he does not receive the offer in writing.

Progressive v. Palomera-Ruiz, 231 P.3d at 388.

We return, accordingly, to our point that the Arizona UM/UIM statute distinctly requires that information relating to a transaction be provided to a consumer in writing. As we have indicated, nothing in the text of the statute would have precluded Progressive from providing such information by fax or e-mail. Yet even if the statute were interpreted to require notice in paper form, E-SIGN would have accommodated such a requirement, permitting Progressive to "use an electronic record to provide" that information only if it obtained Thompson's consent to do so, advised what hardware and software he would need to receive and retain an electronic transmission, and otherwise satisfied the E-SIGN protocol. 15 U.S.C. § 7001(c) (1).

Progressive took none of the consumer protective measures that E-SIGN establishes in such circumstances. It made none of the requisite

disclosures, did not obtain consent, and most fundamentally, provided no writing whatsoever, electronic or otherwise.

Progressive asserted to the Arizona Court of Appeals that it obtained any necessary consent because, by initiating a telephonic transaction with Progressive, Giant Electric's owner voluntarily consented to do business electronically. (Petitioner's App. at 222). Thompson did not consent, however, to receive mandatory consumer disclosures by electronic record rather than a writing. *See* 15 U.S.C. § 7001(c)(1)(A). Nor was he provided an electronic record. *See* 15 U.S.C. § 7001(c)(1). Nor was he even informed, as the verbatim transcript makes plain, that the conversation was being recorded or that an electronic record of the conversation would be preserved. This is far from the informed consent that E-SIGN requires.

Progressive may argue, however, as it did to the Arizona Court of Appeals, that such disclosures were unnecessary because E-SIGN does not require compliance with its consumer consent requirements when a transaction takes place by phone. (Petitioner's App. at 221). In support of this argument, Progressive cites § 7001(c)(6), which provides:

> **(6) Oral Communications**
>
> An oral communication or the recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided by law.

That Progressive misinterprets paragraph 6 may be seen both in the text of that paragraph and in the

surrounding text and statutory context provided by its presence within subsection 7001 (c). Taking these points in reverse order, the thrust of subsection 7001(c) is to protect consumers, and its central element is informed consent. When other statutes, regulations, or rules of law deem information relating to a transaction so significant to a consumer that the information must be disclosed to the consumer in writing, subsection 7001(c) undertakes to assure that providing the information by electronic means will acceptably substitute for providing it in nonelectronic form. It would make no sense that Congress, after having created so detailed a protective protocol for electronic textual transmissions, would have chosen to exempt oral communications from any form of textual disclosure, electronic or otherwise. This is so because oral communications, lacking readable, much less retainable, forms of notice, fall far short of electronic textual conveyance in providing consumers the opportunity for review and reflection that consumer disclosure statutes such as § 20-259.01 seek to extend. *See Progressive v. Palomera-Ruiz*, 231 P.3d at 388.

Fortunately, the text of paragraph 6 makes it unnecessary to adopt an interpretation that makes no sense. That paragraph states explicitly that "the recording of an oral communication shall not qualify as an electronic record for purposes of this subsection," and it should be interpreted in the context of § 7001(c) as clarifying that even though such a recording may qualify for other purposes, it "shall not qualify as an electronic record" that may be used in place of a written record to satisfy the disclosure-in-writing requirements that are identified in subsection (c)(1) and the focus of subsection (c) as a whole.

II. THE OPINION OF THE ARIZONA COURT OF APPEALS IN THIS CASE DOES NOT CONFLICT WITH THE NEW MEXICO SUPREME COURT'S *JORDAN* DECISION.

In its effort to attract this Court's review, Progressive manufactures a nonexistent conflict between the Arizona Court of Appeals' disposition of this case and the New Mexico Supreme Court's decision in *Jordan v. Allstate Ins. Co.*, ___ P.3d ___, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010. (Petition at 28 - 31). The cases do not conflict in either holding or rationale.

Jordan consists of three consolidated cases in each of which the New Mexico Supreme Court unequivocally upheld its state's statutory requirement "that a rejection of UM.UIM coverage equal to the liability limits in an automobile insurance policy must be made in writing and must be made a part of the insurance policy that is delivered to the insured." *Id.* at ¶2, interpreting N.M. Stat. Ann. 1978, § 66-5-301 (1983). Although the Arizona and New Mexico statutes differ somewhat in their writing requirements, the New Mexico Supreme Court described its statute's underlying policy in terms entirely consistent with the rationale of the Arizona Court of Appeals in the case below:

> Despite this Court's repeated pronouncements that an insured's decision to reject UM/UIM coverage must be *knowing and intelligent* in order to effectuate New Mexico's public policy, ... these consolidated cases indicate that insurers continue to offer UM/UIM coverage in

> ways that are not conducive *to allowing the insured to make a realistically informed choice.*

Jordan at ¶21 (emphasis added) (internal citations omitted).

While Progressive singles out one of the three consolidated New Mexico cases for comment, its facts highlight and confirm the inadequacy of the oral approach that Progressive rests on in the present case. Specifically, the New Mexico consumer in question did not purchase insurance by telephone, but through an insurer's website that provided a menu of priced UM/UIM options. After the consumer had entered requested data on the website, the insurer suggested a package that included UM/UIM coverage equal to the chosen liability limits. The consumer, however, choosing among a set of listed alternatives, instead selected UM/UIM coverage in a lesser amount. *Id.* at ¶¶ 10, 34. The New Mexico Supreme Court accepted this on-line selection as a written rejection of the higher coverage for statutory purposes, but held that the insurer had failed to satisfy the further statutory requirement of "deliver[ing] a policy that expressly alerted [the insured] that she had rejected a portion of the UM/UIM coverage to which she was entitled." *Id.* at ¶¶34, 35.

The distinctions between *Jordan* and this case are apparent. That transaction occurred on line; this one took place by phone. There, through its online menu, the insurer provided the consumer with text that she could read, review, and -- if she wished to print it -- retain. That method would have served the protective purpose that the Arizona Court of Appeals attributed to the written notice requirement -- an "opportunity for

review" that makes the consumer more "likely to comprehend the significance of what is being offered." *Progressive v. Palomera-Ruiz,* 231 P.3d at 388. No text and no such opportunity were provided in the case at hand.

CONCLUSION

This is not a case, contrary to Progressive's representation, in which Arizona, by statute or by statutory interpretation, has "purport[ed] to invalidate any possibility of a proper electronically documented notice and offer of UM/UIM coverage." (Petition at 9). Nor has Arizona statutorily or judicially impeded "the use of electronic records and signatures in e-commerce" (*Id.* at 11) by enforcing the written notice requirement of § 20-259.01. Progressive had abundant electronic means available to convey the requisite offer by written notice in this case. It used none. It made the offer orally by telephone, and it gave no written notice, electronic or otherwise. The consequences under Arizona law are clear, yet Progressive seeks to evade them by asserting preemption under a federal statute that does not apply.

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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No. 10-963

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In The Supreme Court of the United States

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation,

Petitioner,

vs.

ESTATE OF JOSE JUAN PALOMERA-RUIZ, a single man; GIANT ELECTRIC CORPORATION, an Arizona corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

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TABLE OF CONTENTS

Page

LEGAL ARGUMENT 1

I. The Estate's Purported Distinction Between an "Offer" and a "Record" Is Inconsistent With E-SIGN Because It Denies Legal Effect to Recorded Phone Calls 2

II. The Interpretation of E-SIGN's and UETA's Consent Provisions Is an Important Federal Question 4

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Air Courier Conference of America v. American Postal Workers Union AFL-CIO, 498 U.S. 517, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991) 2

Baden v. Craig-Hallum, Inc., 646 F. Supp. 483 (D. Minn. 1986) 8

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) 2

City of Lockhart v. U.S., 460 U.S. 125, 103 S. Ct. 998, 74 L. Ed. 2d 863 (1983) 2

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) 2

Glover v. U.S., 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001) 2

Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999) 2

In re Munzberg, 388 B.R. 529 (Bankr. D. Vt. 2008) 7

In re Padgett, 408 B.R. 374 (B.A.P. 10th Cir. 2009) 7

International Broth. of Elec. Workers, AFL-CIO v. Hechler, 481 U.S. 851, 107 S. Ct. 2161, 95 L. Ed. 2d 791 (1987) 2

Johnson v. Equifax, Inc., 510 F. Supp. 2d 638 (S.D. Ala. 2007) 8

TABLE OF AUTHORITIES – Continued

Page

Jordan v. Allstate Ins. Co., 245 P.3d 1214, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010 1

National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999) 2

State Farm v. Ash, 181 Ariz. 167, 888 P.2d 1354 (App. 1994) 8

Tacon v. Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973) 3

Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) 2

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) 3

STATUTES AND RULES

15 U.S.C. §§ 1601 *et seq.*, Truth-in-Lending Act 7

15 U.S.C. § 1681g 8

15 U.S.C. § 7001(c) 6, 7, 8

15 U.S.C. § 7001(c)(1) 5, 6, 9

15 U.S.C. § 7001(c)(6) 6, 9

Ariz. Rev. Stat. § 20-259.01 ..... 3, 8

Ariz. Rev. Stat. § 44-7005(B) 8

Rule 10b-16 of the Securities Exchange Act of 1934 8

U.S. SUP. CT. RULE 15.6 1

TABLE OF AUTHORITIES – Continued

Page

SECONDARY SOURCES

2A FED. PROC., L. ED. § 3:856 2

Ethna M.S. Piazza, *Common Misconceptions Surround Electronic Transactions With Consumers*, 19 No. 5 INTELL. PROP. & TECH. L.J. 15 (May 2007) 7

Robert A. Wittie & Jane K Winn, *Electronic Records And Signatures Under The Federal E-Sign Legislation And The UETA*, 56 BUS. LAW. 293 (2000) 5

LEGAL ARGUMENT

Pursuant to U.S. SUP. CT. RULE 15.6, Petitioner, Progressive Casualty Insurance Company ("Progressive"), hereby files this Reply addressing new points raised in the Respondent Estate of Palomera-Ruiz's ("Estate") Response in Opposition to the Petition for Certiorari.[1] The Court should reject the Estate's purported distinction between an "offer" and a "record" because the argument has been waived, and in any event, it is inconsistent with E-SIGN. The Estate's position merely highlights Progressive's point that the dispute over the validity of electronic recordings of oral communications under E-SIGN and UETA is an important federal question and a matter of nationwide importance. The Court should grant certiorari to issue valuable guidance on the proper interpretation of E-SIGN's and UETA's consent provisions.[2]

---

[1] The Estate correctly identifies an error in Progressive's Petition, that the at-fault motorist in the subject accident was uninsured rather than underinsured, but this does not make any difference in the analysis of E-SIGN or UETA, and the Estate does not argue otherwise.

[2] The final argument in the Estate's Response is that the opinion of the Arizona Court of Appeals in this case does not conflict with the New Mexico Supreme Court's decision in *Jordan v. Allstate Ins. Co.*, 245 P.3d 1214, 2010-NMSC-051, Oct. 18, 2010, *reh'g denied*, Dec. 3, 2010. Because Progressive fully addressed *Jordan* in Section III of its Petition, and because it provided additional nationwide authorities in Section IV of its Petition, those arguments are not repeated here.

I. The Estate's Purported Distinction Between an "Offer" and a "Record" Is Inconsistent With E-SIGN Because It Denies Legal Effect to Recorded Phone Calls.

The Estate contends that E-SIGN is inapplicable to this situation because of the alleged "distinction between an offer and the record of an offer." (Estate's Resp. Br. at 10). The Estate failed to raise this argument in the trial court, and none of the courts below have considered it or relied on it. Consequently, the Estate has waived this argument. *See* 2A FED. PROC., L. ED. § 3:856 ("The Supreme Court will generally not reach an issue which is not raised, considered, or resolved in the court below, but is raised for the first time on appeal.") (citing *Glover v. U.S.*, 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992); *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); *International Broth. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 107 S. Ct. 2161, 95 L. Ed. 2d 791 (1987); *City of Lockhart v. U.S.*, 460

U.S. 125, 103 S. Ct. 998, 74 L. Ed. 2d 863 (1983); *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981); *Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973)).

The Estate's construction of its alleged distinction between an "offer" and a "record" demonstrates the semantical lengths and theoretical hairs that must be split in order for the Estate to rationalize its position with E-SIGN. Specifically, the Estate contends that "the electronic *record* of Progressive's transaction was not denied validity or effect; the format of its record-keeping was irrelevant to the disposition of the case. . . . Progressive's fault lies not in the record but in the offer." (Estate's Resp. Br. at 10-11; emphasis in original). The Estate's misguided distinction between an "offer" and a "record" might be more persuasive if both the "offer" and "written notice" elements of Ariz. Rev. Stat. § 20-259.01 were under dispute in the present appeal. That is not the case. Progressive undisputedly made the "offer" of higher UM/UIM limits to Giant Electric. The issue here is whether the recorded phone call qualifies as "written notice" under E-SIGN, UETA, and AETA. The Estate concedes an electronic "record" can be kept after the offer, but elevates a prior "written" offer to some other standard. That is form over substance. Therefore, this Court should reject the Estate's purported distinction between an "offer" and a "record."

Similarly, the Estate further hypothesizes that an offer of UM/UIM coverage conveyed through visual technologies like fax or e-mail would qualify under

Arizona's UM/UIM statute, but a phone call does not qualify. The Estate wants to mandate a visual, readable format for the offer over all other technological methods. This elevation of visual technologies over non-visual ones is contrary to E-SIGN's requirement of technology-neutrality. What the Estate is really arguing is that no oral contract or record should be given legal effect under E-SIGN. What does this mean if a consumer is blind? Are we limited in the technological assistance that can be used? The Estate's attempt to limit the ways to comply with the statute for its benefit despite an acknowledged agreement to the contrary as to the UM/UIM limits highlights Progressive's point that the dispute over the validity of electronic recordings of oral communications under E-SIGN and UETA is an important federal question and a matter of nationwide importance. (*See* Progressive's Petition at 21-27).

Accordingly, the Court should grant the Petition for Certiorari.

II. The Interpretation of E-SIGN's and UETA's Consent Provisions Is an Important Federal Question.

This Court should reject the Estate's argument that Progressive failed to comply with E-SIGN's consent requirements. Instead, the Court should grant certiorari to clarify the proper interpretation of E-SIGN's and UETA's consent provisions. The Estate's limited notion of consent is incompatible with

the applicable statutes. To require an agreement in paper form, or even to require any explicit agreement at all, would defeat the purposes of E-SIGN and UETA. Commentators have explained that "[t]he mere fact of use, or of behavior consistent with acceptance, by a party should be sufficient to evidence that party's willingness and to make applicable E-SIGN's base rule." Robert A. Wittie & Jane K Winn, *Electronic Records And Signatures Under The Federal E-Sign Legislation And The UETA*, 56 BUS. LAW. 293, 299-300 (2000) (noting that "E-SIGN's rule is negative, providing only that parties are not required to use or accept them."). Here, Progressive manifested its assent to do business electronically by advertising its 800 number. Giant Electric manifested its assent by calling the 800 number, agreeing to procure a policy, selecting UM/UIM coverage orally over the phone, and by providing identifying information, including the company president's name, title, driver's license number, bank account number, routing number, and a check number. [*See* App. at 86, 90, 99-101, 103-04, 116-17].

Moreover, Giant Electric's consent was unnecessary, because E-SIGN clearly states that compliance with its consent requirement, 15 U.S.C. § 7001(c)(1), is not required in the case of a phone call:

> (6) Oral communications
>
> An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this

> subsection [15 U.S.C. § 7001(c)] except as otherwise provided under applicable law.

15 U.S.C. § 7001(c)(6). Therefore, pursuant to § 7001(c)(6), the consent requirement of § 7001(c)(1) does not apply to oral communications, including the recorded phone conversation in this case. In addition, the explicit exemption of recorded phone calls from E-SIGN's consent requirements further demonstrates that recorded phone calls *do* qualify as electronic records under the remainder of the statute. Certainly if oral communications and recordings of oral communications were not electronic records, then Congress would have no need to exclude them in subsection (c)(6).

The plain language of subsection (c)(6) makes the Estate's speculation about Congressional intent unnecessary. But even if the Court inquires about Congressional intent, the Estate's discussion of the alleged policy relating to oral communications is contrary to E-SIGN's purpose and makes no practical sense. Instead, it is reasonable to conclude that the reason Congress exempted oral communications from the consent requirements of 15 U.S.C. § 7001(c)(1) was because those requirements are unwieldy in the case of phone calls. Under the Estate's view, where, as here, a new customer initiates contact over the phone, the parties would be required to: (1) end their phone conversation immediately; (2) the insurer must send a letter requesting the customer's consent to do business electronically; (3) the insured must send the

letter back, indicating that he or she agrees to do business electronically; and finally, (4) the parties may resume their phone conversation. Such an approach is obviously time-consuming and not required by the statutory language. The Estate's approach would essentially undermine E-SIGN and result in hindrance of all electronic transactions and a return to paper transactions. This is not what Congress intended. Consequently, Giant Electric's conduct of willfully calling Progressive's 800 number and providing the information during the phone call was a sufficient manifestation of its consent to an electronic transaction and an electronic record.

The Estate's argument relating to consent is also flawed because 15 U.S.C. § 7001(c) applies only to "consumer disclosures." A consumer disclosure is information about a transaction that is required by statute to be disclosed to a consumer; for example, disclosures required by the Truth-in-Lending Act. Ethna M.S. Piazza, *Common Misconceptions Surround Electronic Transactions With Consumers*, 19 No. 5 INTELL. PROP. & TECH. L.J. 15, 15 (May 2007); *see also In re Padgett*, 408 B.R. 374, 388 (B.A.P. 10th Cir. 2009) (citing *In re Munzberg*, 388 B.R. 529, 543 (Bankr. D. Vt. 2008) (stating that Federal Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.*, is a consumer disclosure statute)). Other examples of consumer disclosures are: (1) the consumer reporting agency's file that is revealed to the consumer as contemplated

by 15 U.S.C. § 1681g, *Johnson v. Equifax, Inc.*, 510 F. Supp. 2d 638, 645 (S.D. Ala. 2007), and (2) Rule 10b-16 of the Securities Exchange Act of 1934 requiring the disclosure of, among other things, the annual rate of interest, *Baden v. Craig-Hallum, Inc.*, 646 F. Supp. 483, 488 (D. Minn. 1986) (Rule 10b-16 is a consumer disclosure provision to protect investors). 15 U.S.C. § 7001(c) is inapplicable because Arizona's UM/UIM statute, Ariz. Rev. Stat. § 20-259.01, is not a disclosure statute. It merely requires that an offer of UM/UIM coverage be made. *State Farm v. Ash*, 181 Ariz. 167, 173, 888 P.2d 1354, 1360 (App. 1994) ("The insurer need only make the written offer.").

Similar to E-SIGN, AETA's consent requirement provides:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is *determined from the context and surrounding circumstances, including the parties' conduct.*

Ariz. Rev. Stat. § 44-7005(B) (emphasis added). The drafters of UETA explained that "it is essential that the parties' actions and words be broadly construed in determining whether the requisite agreement exists." UETA § 5, Comment 4. Once the intent to conduct a transaction electronically is established, UETA applies. *Id.* UETA does not require consent to be

explicit or in a visual format. UETA Prefatory Note (A) states:

> [T]he construction of the term agreement must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, *regardless of whether the intent rises to the level of a formal agreement.*

UETA Prefatory Note (A). Consequently, Giant Electric's conduct of willfully calling Progressive's 800 number and providing information during the phone call was a sufficient manifestation of its consent to an electronic transaction and an electronic record.

This Court should grant certiorari in order to clarify that a party may implicitly consent to do business electronically under E-SIGN and UETA, through behavior consistent with acceptance. In addition, the Court should clarify that, pursuant to 15 U.S.C. § 7001(c)(6), the consent requirements contained in 15 U.S.C. § 7001(c)(1) do not apply to oral communications.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. Alternatively,

the Court should grant certiorari and summarily reverse.

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